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Wm. B. GOSWELL
LINCOLN INN GATE
BURY ST. LONDON

JSN
JAB
YWA
v.3

Wm. Montagu
~~Reports of Cases~~
REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

Court of King's Bench,

DURING THE TIME

LORD MANSFIELD PRESIDED IN THAT COURT,

FROM

*Michaelmas Term, 30 Geo. II. 1756, to Easter Term,
12 Geo. III. 1772.*

IN FIVE VOLUMES.

**By SIR JAMES BURROW, KNIGHT,
LATE MASTER OF THE CROWN-OFFICE, AND ONE OF
THE BENCHERS OF THE HONOURABLE SOCIETY
OF THE INNER TEMPLE.**

THE FOURTH EDITION,

**WITH THE ADDITION OF CRITICAL NOTES AND OBSERVATIONS, AND
REFERENCES TO OTHER REPORTS AND AUTHORITIES.**

VOL. III.

*From Michaelmas Term, 2 Geo. III. 1761, to
Trinity Term, 6 Geo. III. 1766, inclusive.*

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1812.

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MICHAELMAS TERM,

1235-1236

2 GEO. III. B. R. 1761.

SULSTON *versus* NORTON.

Monday, 10th
Nov. 1761.

THIS was an action on the statute of 2 G. 2. c. 24. § 7. [S. C. 1 Black. 317.]
“ for the more effectual preventing bribery and
“ corruption in the election of members to serve in par-
“ liament.”

Action for
bribery will
lie, though
the party do
not vote.

The declaration contained five counts: first, that the defendant *corrupted* one *Moore* to vote for Lord *Villiers* and Sir *Robert Burdett*, by giving him five pounds five shillings; secondly, a corrupt agreement to give *Moore* five pounds five shillings; thirdly, a corrupt agreement to lend him five pounds five shillings upon a promissory note; fourthly, a corrupt agreement to deliver the note to *Moore* on voting; fifthly, for giving the note and counter-note hereafter mentioned. A verdict was found for the plaintiff, and entered on the first count.

Mr. Serjeant *Hewitt*, on behalf of the plaintiff, shewed cause against setting aside the verdict; which had been moved for, on the part of the defendant.

Mr. *Caldecott*, on behalf of the defendant, had objected, when he made that motion,

First, that the man *did not in fact vote* for the persons he promised to vote for; but, on the contrary, voted for their *opponents*: and therefore the defendant, as he did not by any corrupt agreement *procure Moore* to vote for them, cannot be said to have *corrupted* him to do so.

Secondly, That the verdict ought not to have been taken on the first count, which was for giving him the money.

To the first objection, the case of *Bush v. Rawlins* [1236]
B. R. P. and *Tr.* 29 G. 2. was said, by the Serjeant, to be a full answer, being in point.

And in answer to the second objection, he alledged that the evidence given very sufficiently supported the taking the verdict on the first count; and for the truth of his allegation, appealed to Mr. Justice *Foster*, who tried the cause.

Mr. Justice *Foster* reported the evidence to have been,
“ that the defendant gave *Moore* five guineas, to vote for
“ Lord *Villiers* and Sir *Robert Burdett*; that *Moore* gave
“ him a note for it; and the defendant gave him a coun-
Vol. III. B

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W. Flint, St. Sepulchre's London,

1761.
SULSTON
V.
NORTON.

"ter-note, obliging himself to give up the former note when the condition should be performed."

Mr. *Caldecott* and Mr. *Thurlow*, for the defendant thereupon observed, that the act of parliament says, "if any person, &c. shall take any money, &c. by way of gift, loan, or other devise:" and though the plaintiff has laid this several ways, he has taken a verdict as upon a gift; whereas it appears in fact, *not* to have been a gift, but a loan or other devise.

In order to intitle them to take a verdict on the first count, they must have proved it to be a gift: which, it appears by the judge's report, they could not prove.

The statute expressly distinguishes between *gifts* and loans or other devises. And so indeed does their own declaration: for, the first count is founded upon the former; the four others, on the latter.

This action being upon a *pejial* statute, it therefore ought to be taken strictly.

This case, *as it is laid*, differs from that of *Bush v. Rawlins*: the resolution there does * not interfere with this. For here, "*corrupting Moore to give his vote*," must mean actually "*procuring him to give his vote*:" whereas the man did *not* vote so; and consequently, the other candidate (Mr. *Luttrel*) was not hurt, at all, by what the defendant did.

* That resolution was, "that the giving a bribe to forbear voting at the election of a member to parliament was an offence within this same act and clause, although the man did not forbear to vote, but actually voted for the opponent's candidate;" and "that there was no need for the plaintiff to allege in his declaration, that the man did actually give, or forbear his vote, according to his promise." [See also 4 Burr. 2499.]

[1237] Lord *Mansfield*—The first objection is in the nature of a motion for a new trial on account of a mis-direction by the judge.

[S. C. cited Cowp. 199.] But the case of *Bush v. Rawlins* is in point. And I wonder how it could ever be a doubt: for, the offence was *completely* committed by the *corrupter*; whether the other party shall afterwards perform his promise, or break it.

Secondly, As to the verdict's being taken on a wrong count—The evidence *does* support the first count. For this is a *GIFT*: the note and all the rest is mere *evasion, colour, disguise*, and device to evade the law.

But if it were not so, the verdict was given generally for the plaintiff. If, by mistake, it has been entered upon a count not proved, instead of the count which was proved, *that* is no reason for a new trial: the blunder has not injured the defendant. The court ought rather to rectify the mistake, by ordering the verdict to be entered

upon the right count, agreeable to the evidence and consequently the *true* ground upon which the jury found for the plaintiff.

However, the *gift* is the *true* and proper count to take it upon: if it was really a *loan*, (a) it would be no corruption.

Mr. Justice *Wilmot* held accordingly. This is the right and true count to take the verdict upon.

Per Cur'.

RULE DISCHARGED.

STEVENSON *versus* SNOW.

Tuesday, 17th
Nov. 1761.

THIS was a special case reserved at a trial at *nisi prius* before Lord *Mansfield* in *London*, upon an action for money had and received to the plaintiff's use, brought by the plaintiff, the insured, against the defendant, the insurer, for a return of part of the premium. [S.C. 1 Black' 315, 318.] If risk not run, the insurer to retain only a part of the premium. (See 1 Bosanq. 171)]

Case—It was an insurance upon a ship, at five guineas *per cent.* lost or not lost, at and from *London to Hullifax* in *Nova Scotia*, warranted to depart *with convoy* from *Portsmouth*, for the voyage, that is to say, the *Hallifax* or *Louisbrough* convoy.

Before the ship arrived at *Portsmouth*, the *convoy* *was gone*. Notice of this was immediately given by the insured to the underwriter: and at the same time, he was also desired either to make the long insurance, or to return part of the premium. [1238]

The jury find that the usual settled premium from *London to Portsmouth* is one and one-half *per cent.*

They find also that it is *usual* for the under-writer, in such like cases, to return *part* of the premium; but the *quantum* is uncertain: (and the quantum must in its nature be uncertain; because it depends upon uncertain circumstances.)

It is stated that the plaintiff made to the defendant an offer of allowing him to retain one and one-half *per cent.* for the risque he had run on such part of the voyage as was performed under the policy, *viz.* from *London to Portsmouth*.

Mr. *Yates* was counsel for the plaintiff; and argued that as the defendant had *not*, by reason of this accident, run the whole intended risque, he ought not to keep *all* the premium; but ought to return so much as is proportionable to the latter part of the voyage insured,

(a) The word *loan* is used in the description of the offence in the person taking, but not in that of the person giving the bribe, 2 Geo. 2. c. 24. § 7.

1761. STEVENSON v. SNOW. namely, from *Portsmouth* to *Hallifax*: on which part of the voyage he has run no risque at all. The plaintiff has offered to let him retain so much as belongs to the former part of the voyage, viz. from *London* to *Portsmouth*; in which, he did run a risque: and the premium for that part of the voyage is at a settled known price.

Mr. *Wedderburn*, contra, for the defendant, endeavoured to maintain that the defendant was intitled to keep the whole premium.

The consideration was a *valuable consideration*, a stipulated price agreed upon by the parties for the whole voyage: and the voyage, was accordingly entered upon; and part of the risque was actually run by the defendant.

[3 Vin. 6.
pl. 21.]

This contract was *entire*, and cannot be apportioned by any court whatsoever. The premium must have been originally settled, upon computing the different risques of different parts of the voyage, all *blended together*. One part of the voyage is often much more dangerous than another: it might be the case of *this* voyage.

[1239]

But even taking it *more largely*, as a contract *jure gentium*: and not confined to the strict common-law notion of entirety of contract;—The premium is a matter *stricti juris*: the insurer was honestly and truly intitled to the premium, as soon as ever the risque was begun.

The object of the insurance, viz. the voyage, is also a matter *stricti juris*. The insured can not substitute another voyage in its place; though it should be a shorter and easier one. If the ship had been lost between *London* and *Portsmouth*, the insurer would have been liable to pay the whole. If the ship had made a *deviation*, or returned after she had left *Portsmouth* and was under convoy to *Hallifax*, the insurer would certainly and without dispute have been intitled to the whole premium, notwithstanding that part of the risque was not run at all. And so it is now, as the voyage was entered upon, and his risque once begun.

Mr. *Yates*, in reply. The entirety of contract is no reason in the present case. For this voyage is, in its nature, *divisible*: the voyage from *London* to *Portsmouth* is a distinct voyage from the voyage from *Portsmouth* to *Hallifax*.

The departing with convoy is the condition of the insurance.

If the ship had been lost between *London* and *Portsmouth*, the insurer must indeed have paid the loss; but the thirty shillings *per cent.* for that part of the whole voyage insured, would have been the consideration of it, and a full consideration for it.

Here, a part of the consideration fails, without the default of the party insuring. If the risque be not run, the insurer,

in common justice, is not intitled to the premium for insuring it. 1761.

There are two ordinances, (one, of *Konigsbergh*, and the other, of *Stockholm*) which direct a return of the premium to be made, in cases where the policy does not operate, retaining only a small proportion of it (half *per cent.*) for the trouble of having made the insurance. They are in *Magens on Insurances*; Vol. 2. Pa. 190. No. 785. of *Konigsbergh*; Vol. 1. Pa. 266. No. 1070, 1071. of the city of *Stockholm*.

STEVENSON
v.
SNOW.
[Ordin. of Lew.
14. Tit. 6.
Art. 37. acc.]

And this is a right and reasonable rule. We only desire a return of the premium for that part of the voyage where no risque at all has been run.

Lord *Mansfield*, having first stated the case, said—I had [1240] not at the trial, nor have now, the least doubt about this question, myself.

These contracts are to be taken with great latitude: the strict letter of the contract is not to be so much regarded, as the object and intention of it.

Equity implies a condition “that the insurer shall not receive the price of running a risque, if he runs none.”

This is a contract without any consideration, as to the voyage from *Portsmouth* to *Hallifax*; for he intended to insure that part of the voyage as well as the former part of it; and has not. Consequently, the insured received no consideration for this proportion of his premium. And then this case is within the general principle of actions for monies had and received to the plaintiff’s use.

I do not go upon the usage; for the usage found is only “that in like cases, it is usual to return a part of the premium; without ascertaining what part.”

If the risque is not run, though it is by the neglect or [Rocc.p.157.] even the fault of the party insuring, yet the insurer shall not retain the premium.

It has been objected, “that the voyage being begun, and part of the risque being already run, the premium can not be apportioned.” But I can see no force in this objection. This is not a contract so entire that there can be no apportionment. For there are two parts in this contract: (a) and the premium may be divided into two distinct parts, relative, as it were, to two voyages.

The practice shews, “that it has been usual, in such like cases, to return a part of the premium;” though the quantum be not ascertained. And indeed the quantum

(a) This is the only distinction between this case and that of *Tyne v. Fletcher*, *Mic.* 1777. and without attending to it the two cases seem inconsistent.

1761. must vary, as circumstances vary : so that it never can
 STEVENSON have been fixed with any precise exactness.
 v. But though the *quantum* has not been ascertained ;
 SNOW. yet the *principle* is agreeable to the general sense of man-
 kind.

Mr. Justice *Denison* was of the same opinion.
 [1241] It is most equitable, that the defendant should only
 retain the premium for *such part* of the voyage as he has
 run the risque of. The insured has a right to have the
 other part restored to him. And this is agreeable to the
 general principle of actions for money had and received
 to the plaintiff's use : where the defendant had no right
 to retain it, he must refund it.

Mr. Justice *Foster* declared himself to be of the same
 opinion. There is *no consideration* for the remainder of
 the premium ; for the voyage from *Portsmouth* to *Hallifax*,
 wherein no risque was run by the insurer, who only
 insured the voyage *with* convoy : therefore he has no right
 to retain the premium for *this*.

Mr. Justice *Wilmot* declared his concurrence most
 clearly and strongly. He said these kinds of contracts
 are by the writers on this head, called *contractus innomi-*
nati : and the rule which they lay down concerning them
 is, " that they are to be determined *secundum bonum et*
equum."

The jury have here found *usage* " to return part of the
 " premium, in such cases : " which is a strong proof of
 the equity of the thing. And nothing can be more just
 and reasonable.

If the risque was once *begun*, the insured shall not
 deviate or return back, and then say " I will go no far-
 " ther under this contract, but will have my premium
 * returned."

But upon *this* policy, there are *two distinct* points of
 time, in effect two voyages, which were clearly in the
 contemplation of the parties ; and *only one* of the two
 voyages was made ; the *other*, not at all entered upon.
 It was a *conditional* contract : and the second voyage was
 not begun. Therefore the premium must be returned :
 for upon this second part of the voyage, the *risque never*
took place at all.

This is agreeable to what the writers on this subject
 lay down ; and is the right and justice of the case.

Per Cur. unanimously—

Let the *postea* be delivered to the plaintiff.

1761.

MORRIS *versus* PUGH and HARWOOD.

MORRIS

v.

MR. Morton shewed cause on behalf of the plaintiff, PUGH and against a new trial; for which Mr. Norton, who was HARWOOD. for the defendants,* had, a few days ago, moved, because Thurs. 19th (as Mr. Norton said) the *evidence* of the writ ought not to Nov. 1761. have been admitted.

It was an action of trover, for a mare. No actual conversion was proved: but the evidence of conversion was a demand and refusal, on the *second of May*.

It was objected at the trial, "that this demand and refusal appeared to be *subsequent* to the bringing of the writ was actually sued out. "action:" for it appeared on the *nisi prius* roll, that the bill was filed of *Easter term*; and consequently, as there was no special memorandum, it must refer to the *first day* of that term, which was in the beginning of *April*, (long before the time of the demand and refusal upon the second of *May*.) And there was no other evidence but this, to support the declaration.

In answer to this objection, the counsel for the plaintiff produced the writ; which appeared to be sued out AFTER the second of *May*.

The counsel for the defendants objecting to this evidence, as *not admissible*,

Lord Mansfield reserved the point, for the opinion of the court: and if the court should be of opinion "that it *was admissible*," then the verdict (which was found for the plaintiff) was to stand; otherwise the plaintiff to be nonsuited.

Mr. Morton on behalf of the plaintiff, said they had a right to produce the writ, in answer to this objection: and the evidence arising from it was sufficient to intitle the plaintiff to a verdict.

The relation to the first day of the term is only a *fiction*; the fact was in this case quite otherwise.

When they grounded their objections upon this fiction, we shewed that IN FACT, the writ was sued out *subsequent* to the demand.

Therefore this evidence of the real fact answers the fictitious relation of the declaration to the first day of the term; though there be no special memorandum: for, the bill could not, in the course of practice, be filed before the writ was sued out; and the suing out of the writ is a matter in *pajis*.

Mr. Norton contra.—They are concluded by what appears upon the *record*. The bill is the *first process* upon the *title*: and the writ can not be shewn in *contradiction* to it: for, this would be a contradiction to the record.

[S. C. Black.
312, 320
Buller, 198.]

Proof may be
admitted to
shew where a
writ was ac-
tually sued
out.

[See 3 Durn.
361. 7 Durn.
619.]

1761.

MORRIS

v.

FUGH and
HARWOOD.[2 Bosanq.
464.]

Lord MANSFIELD—Refusal upon demand is not an actual conversion, but *evidence* of it. If the refusal on the second of *May* had really been after the action brought, I ought to have left it to the jury, as evidence of a conversion before the bringing of the action. But I had no doubt of admitting the writ, to shew “that the refusal was before the commencement of this suit.”

It is true, if there be no special memorandum, the bill, by fiction of law, relates to the first day of the term. But fictions of law hold only in respect of the *ends and purposes for which they were invented*; when they are urged to an intent and purpose *not* within the reason and policy of the fiction, the other party may shew the truth.

[1 Vent. 195.] The BILL is *not* the commencement of the suit; the writ is: and being after the time to which the bill relates, shews that there should have been a special memorandum. (a)

Judges ought to lean against every attempt to non-suit a plaintiff upon objections which have no relation to the real merits: much more, when the plaintiff is clearly intitled to recover upon the merits, and must recover in another action.

It is unconscionable in a defendant, to take advantage of the *apices litigandi*, to turn a plaintiff round, and make him pay costs where his demand is just. Against such objections every possible presumption ought to be made, which ingenuity can suggest. How disgraceful then would it be to the administration of justice, to allow *chicane* to obstruct *right*, by the help of a legal fiction contrary to the truth of the fact!

I am clearly of opinion “that the writ was *rightly* “admitted to be given in evidence.”

[Ld. Raym.
882.]

It has been determined, in actions upon penal statutes, which must be brought within a limited time,

(a) Where the proceedings are by original writ, such writ is palpably the commencement of the suit; but where the proceedings are by *latitat*, the bill is generally considered as the commencement of the suit, the *latitat* not being a writ of which any entry is made, but only a writ to bring the party into court; and therefore it is clear that if the cause of suit arises *in Michaelmas* term, the plaintiff may in the vacation preceding take out a *latitat* as of the preceding term, but must not arrest on it: Yet a *latitat* will save the bar of the statute of limitations, though that was long doubted of.

Only a Latitat may
issue in the first instance
without signing out any
Bill of Middlesex, Tids
5th Ed 14 & 4th Ed 22.
344-

“ that the plaintiff may shew the true commencement
“ of the prosecution, *contrary* to the fiction;” and this
being done in support of a *penal* action, is much stronger
than the present case; where truth is admitted, to pre-
vent manifest injury and wrong.

Therefore the rule ought to be discharged.

Mr. Justice *Denison* concurred; and mentioned a* case
in Lord *Hardwicke's* time, where his lordship would *not*
nonsuit the plaintiff upon the general memorandum
upon the record; because it was *amendable*.

This indeed, in the present case, was upon *evidence*;
that, in Lord *Hardwicke's* time, was upon *record*: but
there is no difference in reason.

Mr. Justice *Wilmut* concurred: and he said he did not,
nor ever could understand what was meant by “ the *bill's*
“ being the *FIRST PROCESS*,” for there must have been
some *other* process *prior* to the filing the bill.

The *writ* is that *first* process, and *may be shewn*; and
the practice is so, and it is right and reasonable that it
should be so.

Lord *Mansfield*—This too was *amendable*, in the present
case.

Mr. Justice *Wilmut*—There was a rule made about [Buller 17.
amending it; but I am very glad they have not proceeded 18.]
upon that rule; because it has afforded an opportunity
of settling the point.

THE RULE to shew cause “ why the verdict should
“ not be set aside, and a new trial had,” was DIS-
CHARGED.

WRIGHT, ex dimissa. WILLIAM CLYMER *versus*
LITTLER, et al'.

Friday, 20th
Nov. 1761.

[S. C. 1 BL
345.]

THIS was an ejectment for certain copyhold lands
within the manor of *Barnes* in the county of
Surry; in which manor, there is a custom of *borough-*
English.

The lessor of the plaintiff, *William Clymer*, made out
his title, under a regular and undisputed will of his
grandfather *John Clymer*, dated 17th Feb. 1743, and
executed in the presence of three witnesses, disposing
of his freehold, as well as of this copyhold estate to the
lessor of the plaintiff in fee; the testator *John Clymer*
having previously surrendered the copyhold to the use
of his will.

The title of the defendants (who were purchasers
under another *William Clymer*, second and youngest
son of *John*, and uncle to *William* the lessor of the
plaintiff,) depended upon another *subsequent* will (or in-

A void deed
unsealed shall
not operate
as a will, nor
as a revoca-
tion of a for-
mer will.

1761.

MOHRIS

v.

PUGH and

HARWOOD.

[1244]

* There were
two, one for
words, the
other for an
assault and
battery.

1761.
 CLYMER
 v.
 LITTLER.
 [1245]

strument which they called a will) made by the said *John*, as they alledged, on the 20th of *September* 1745: which, they contended was at least a REVOCATION of his former will in 1743. And if it be *only a REVOCATION* of the former will, then *William* the youngest son of *John*, must inherit as heir in *borough-English*.

This will or instrument of 1745, (which was *not* under seal) was all written by one *William Medlicott*, who was son-in-law to the said *John Clymer*, (having married his only daughter *Amy*.)

It was also indorsed on the back, in the *same* hand-writing of the said *William Medlicott*, in these words—"The COVENANT and AGREEMENT of *John Clymer*:" and it was witnessed by the same *William Medlicott*, and one *Elizabeth Mitchell*.

The *body* of it was in these words, "Know all men
 " by these presents, that I *John Clymer* of *Barnes* in the
 " county of *Surrey*, gent. have this day COVENANTED
 " and AGREED in the manner and form following, that
 " is to say; for natural love and affection which I have
 " and bear to my son and daughter and grandson
 " hereinafter named, I do *make, constitute and appoint*
 " the several estates and sums of money following, after
 " the decease of myself and *Amy* my wife, to come to
 " and be given to them. But first of all, my estate called
 " *Barnes* and *Hopton*, to my wife for her life; and after
 " her decease, all that eighteen pounds a year, to my
 " son *William Clymer* for his life; and after his decease,
 " to *William Clymer* my grandson. And as to all those
 " COPYHOLD messuages, lands and tenements at *Barnes*
 " in the county of *Surrey*," (which is the estate in question) " to my daughter *AMEY the wife of William*
 " *Medlicott, her heirs and assigns for ever*; to take and
 " hold the same after the immediate death of myself
 " and said wife, and not before. Dated 20th *September*
 " 1745. *John Clymer*. Witness, *Elizabeth Mitchell*—
 " *William Medlicott*."

It happened, in fact, that this *Amy Medlicott*, daughter of *John Clymer*, and wife of this *William Medlicott*, died *before* her father.

In order to be better understood, I will give a short pedigree of the family; and specify the particular times of their respective deaths.

1761.

CLYMER.

v.

LITTLER.

Old JOHN CLYMER, the testator seized in fee, died in April 1746. He had issue, by his wife *Amy*, two sons and one daughter.

{ *AMY*, wife of old *John Clymer*, died in his lifetime, viz. 7th Feb. 1745.

JOHN CLYMER, eldest son died in his father's lifetime; leaving issue, a son and a daughter.

WILLIAM CLYMER, second son, died a widower, without issue.

AMY CLYMER, married *William Medlicott*: she died in her father's lifetime, viz. in Jan. 1745 without issue.

WILLIAM CLYMER, lessor of the plaintiff.

AMY CLYMER, died an infant.

Upon the death of old *John Clymer*, in 1746, his second son *William Clymer* was admitted to this copyhold estate, (the premises in question,) as heir in borough-*English*; the above-mentioned will of old *John Clymer* in 1743, being then UNKNOWN to every body except the above-named *William Medlicott*, who had it in his possession, but secreted it. [1746. Admission of W. C. the testator's heir.]

This *William*, youngest son of *John*, enjoyed the estate until 1751; and afterwards aliened it to one *Mitchell*: who was admitted in 1751; and afterwards sold it to one *Penley*. *Penley* was admitted; and afterwards sold part of it to *Littler*, one of the present defendants; who was admitted to that part; the other part descended to *Penley's* heir; who was admitted thereto, and then sold it to *Pelham*, another of the present defendants: who was also admitted in due manner. [1751. Sale by the heir to *Mitchell*, who was admitted, who sold it to *Penley*, who was admitted, and sold part to *Littler* one of the defendants who was admitted; the other part descended to *Penley's* heir who was admitted, and sold it to *Pelham*, another of the defendants, who was admitted.]

During the time of all these transactions, the lessor of the plaintiff was at first a *minor*, (a) then at *sea*, (b) always *poor*, (c) and remained ignorant of the will in 1743: till (d) the death of *William Medlicott*, who pro-

(a) For above two years.

(b) How long does not appear.

(c) This was no good excuse; but why did he not give notice to the steward, disseisors, or tenants, or to the purchasers?

(d) Which was but about a year after the death of the testator, and fourteen years before the ejectment, .

1761.
CLYMER
v.
LITTLER.

duced it when dying, and directed it to be delivered to the lessor of the plaintiff.

William Medlicott died in *May* 1747. He had the custody of *both* wills, till a few weeks before his death. The latter will was *found* amongst his papers. The former was *delivered* by the said *William Medlicott* to one *Edwards*, about three weeks before his death: and it was, about three months after, delivered to *William Clymer* the lessor of the plaintiff; who was then about two years under age, but proved it in 1751.

[1247] After this discovery, the lessor of the plaintiff did not bring this ejectment, till after an acquiescence of fourteen or fifteen years from his uncle's first admission to it upon old *John's* death: or at least without the nephew's setting up any claim within that time; during which, his uncle *William*, or the purchasers under him, had been in quiet possession.

At the trial, the lessor of the plaintiff produced and proved the will of 1743: under which, he was devisee of this estate, in fee.

To encounter this evidence, the defendants produced this will or instrument of 1745: and both the witnesses to it (*Elizabeth Mitchell* and *William Medlicott*) being dead, they proved their hand-writings, and also the hand-writing of old *John Clymer*, in the common and ordinary form.

Whereupon the plaintiff's counsel insisted, that this will or instrument was, in the first place, an absolute FORGERY; and in the next place, that in point of law it *could not operate as a REVOCATION* of the will in 1743.

And they called *Mary Victor*, sister to the said *William Medlicott*, who was one of the subscribing witnesses to the will or instrument of 1745: which *Mary Victor* swore, "that whilst she was attending her said brother *William Medlicott* in his last illness, and about three weeks before his death, he pulled out of his bosom the will of 1743, and said "it was the TRUE will of *John Clymer*;" and then delivered it to her, with "directions to deliver it over to *William Clymer* the lessor of the plaintiff, or to Mr. *Faulkner*." And she added, "that one *Edwards* was present at the time."

This *Edwards* (who had been already called on the part of the defendants, to prove the hand-writing of *Elizabeth Mitchell*, one of the witnesses to the will or instrument of 1745,) on being cross-examined on the part of the plaintiff, confirmed *Mary Victor's* evidence "that *Medlicott* did pull the will of 1743 out of his bosom,

"and gave it to her with such directions as she had
"deposed." 1761.

Upon *Mary Victor's* cross-examination by the counsel for the defendants, she not only persisted in what she had before deposed, but also added that at the same time that *William Medlicott* produced the will of 1743, as the true will of old *John Clyner*, he acknowledged and declared to her "that the said will or instrument of 1745
"was forged by himself." CLYMER
v.
LITTLER.

No objection was made to this evidence, by the counsel for the defendants, at the trial. [1248]

The judge and jury (a special one) perused and examined the two instruments of 1743 and 1745, and their different signatures;—and took notice of the circumstances of the latter, being all of the hand-writing of this *William Medlicott* himself; and disposing of a fee to *Medlicott's* own wife: and, upon the whole, they were all of opinion "that it was a forgery." And the judge directed the jury to find for the plaintiff: which they did.

On Tuesday, 10th November 1761, Mr. Norton moved, on behalf of the defendants, for a new trial; upon the foot of a misdirection by the judge who tried the cause, upon a point of evidence: and a rule was made to shew cause why the verdict should not be set aside, and a new trial granted.

This cause coming on to be argued yesterday (19th November 1761,) Mr. Justice WILMOT reported the evidence from Lord Chief Justice *Willes*; who tried the cause, and who was satisfied with the evidence, and reported that no objection was made at the trial, to the evidence given by this witness, *Mary Victor*. * I have already endeavoured to throw the whole together, as clearly as I was able.

Mr. Justice *Wilmot* having made his report, and several additional circumstances, not mentioned in the report, having been agreed by the counsel on both sides;—

Mr. Norton proceeded. He objected to the admission of this evidence, as being only HEAR-SAY evidence. What *Medlicott* said, ought not to be admitted or regarded: for it was not said upon oath, nor was there any opportunity of cross-examining him. [Objection to the hear-say.]

Indeed, this evidence would have been of little or no weight, even if he had given such a testimony HIMSELF; after having himself solemnly attested this will, as a witness to it.

This pretended declaration was made near fifteen years ago (for he died in 1747:) and yet the ejectment was not brought till 1761.—This sort of evidence shall not overturn a title confirmed by so many years possession. [Ejectment brought in 1761.]

Besides, we are a purchaser for a valuable consideration,

1761.

CLYMER

v.

LITTLER.

[No objection
to the heir's
title.]

under the heir at law; to whose title no objection was ever made.

Mr. *Eliab Harvey*, for the plaintiff, admitted the *possession* to have gone in the course of *descent* in *borough English*; but observed that the granting new trials is not so necessary in *ejectment* as it may be in other cases; because it is easy to bring another *ejectment*.

As to the *length of time* they have been in possession—*William* the grandson (the lessor of the plaintiff) was *poor*, a *minor at sea*, and *ignorant of the will* in 1743.

Our title stood upon an *unexceptionable will*. Their's is rather a *deed of covenants*: but they insisted upon it as a *testamentary act* and a *revocation*.

Their own witness, *Edwards*, proved in the course of giving his evidence, "that *Medlicott* did produce out of his bosom, the will of 1743, and delivered it to *Mary Victor*, to be given to the lessor of the plaintiff or to Mr. *Faulkner*."

We called this *Mary Victor*, not to give evidence of the *forgery*, but to *impeach the credit* of their evidence *William Medlicott*.

If *Medlicott* had been *living*, he must have been called to prove the will. And if he had *owned*, "that he forged it," it could not have been established: or if he had proved the *execution* of it, we should have been at *liberty* to *discredit* his personal evidence, by *shewing* "that he had himself owned it to be a *forgery*." And surely, we may give the SAME evidence *after he is dead*, in contradiction to the proof made by other persons, of his hand-writing.

In this second instrument of 1745, there is a disposition "to *Medlicott's* wife, in fee:" she *died before* the testator. But it was *no will*, *no testamentary act*, nor even a *deed*.

This is the verdict of a *special jury*. And Lord Chief Justice *Willes* compared the papers, and declared "that it bore the *appearance* of a *forgery*." The jury thought so too. And their verdict ought to stand.

[1250]

Lord MANSFIELD ordered both the wills or instruments to be produced here, to day: to which time it was adjourned.

And they being now, accordingly, produced—

Mr. *Norton* for the defendants, proceeded, to the following effect. We could have proved this will, even *without calling Medlicott*, if both the witnesses had been *living*: or if *Medlicott* himself had been alive and been called, he might have explained the occasion of his saying such words to such a person and at such a time.

The *consequence* of admitting such evidence as this

is, would be fatal: and no purchaser under a will could be safe.(a)

Here were many *notorious changes of the property*; and an absolute *acquiescence* all the time by the lessor of the plaintiff.

The wills are now both of them before the court. That of 1745 enures either as a *will of copyhold land*, or as a good writing to *appoint the uses* of a surrender of copyhold land; or, at least, as a *revocation* of the will made in 1743.

First, it is a good will of *copyhold* lands. *Copyhold* lands are *not within* the statute of frauds, and *no witnesses at all* are necessary to such a will. It is a good will under the statute of *Hen. 8.* * That statute only requires * 52 H. 8. c. 1. "that it be a will *in writing*."

I agree that here is no disposition of the *personal* estate, or any appointment of an *executor*. But still it is a good will of *copyhold* land: for neither of those are necessary in a will of copyhold land. It gives an estate for life to his wife, with remainder to *William Clymer*, under whom we claim. And the Ecclesiastical court have received it, and suffered it to be proved as a *will*.

Secondly, it is a *good instrument to appoint the uses of a surrender*.

Any writing is sufficient for *this* purpose: it needed not any attestation.

Thirdly, at least, it will operate as a *revocation*,

Revocations are *favoured*, both in law and equity. There are many methods of revocation: a will may be revoked by *mere operation of law*, without the intention of the party. A feoffment without livery, a bargain and sale without enrolment, a grant without attornment, are sufficient to do it.

But by his *own act*, a man may by writing revoke one will, without making another.

Before the statute of frauds, he might have revoked it *verbally*, by mere *parol* only.

Any act *inconsistent* with the will, though *ineffectual* to the purpose it was *intended* for, yet being done by the maker of the will, is a *revocation*, because it shews his intention to revoke the disposition he had before made of his estate.

1761.

CLYMER
V.
LITTLER.

[1251]

(a) The purchases were under *W. C.* the second son, who was the customary heir, the land being *borough English*; and note that the plaintiff's title, and not the defendant's, were under a will; and that the defendant attempted to set up a supposed will or deed in 1745, as a revocation of the will under which the plaintiffs claimed.

1571.

CLYMER

V.

LITTLE.

* V. ante,
p. 1245.

This writing fully shews the *animus revocandi*: which alone is sufficient. It is indeed a very inaccurate instrument: but it is *in writing*; and he says * "*I have agreed that my estate shall go so and so.*" And this will or writing shews his intention of a *total* revocation of the former: for, by this, he disposes of his land to a very different purpose from the former disposition of it by the will of 1743.

Both wills were read in court.

Mr. Hurcey and Mr. Lee argued for the lessor of the plaintiff, William Clymer, the grandson.

They observed that Mr. Norton's objection was confined to the evidence of Mary Victor, sister to William Medlicott, one of the witnesses to the will of 1745; and they observed too that her evidence was corroborated by the evidence of Mr. Edwards, one of their own witnesses.

But it was to be further observed, they said, that the verdict was *not founded* on this evidence ONLY. For the special jury actually *saw* and *deliberately perused* the will or instrument of 1745; and upon such *view, inspection, and examination*, and upon all the circumstances of the disposition, they judged it to be a forgery.—Besides, *no objection* was taken to the evidence *at the trial*. They might have objected to it then, or demurred to it.

[1252] As to *acquiescence*—The lessor of the plaintiff was but seventeen years of age, when his grandfather died; was always poor; and was at sea, the most part of his time.

But as to the EVIDENCE itself—It was *strictly and legally admissible*. It was not given in order to *prove the forgery*, but to DISCREDIT their evidence, arising from the proof of Medlicott's hand. Medlicott must have been called, *if living*, and would have overturned the will or writing of 1745, by giving this evidence of what Mary Victor swears he owned to her. The present proof is only "that he was a subscribing witness." And this evidence might be and was proper to be given to take off the force of such his attestation.

As to the *legal operation* of this will or instrument of 1745—

First, It is *no good will of LAND of any kind*: there is no *animus testandi*; no publication; no mark of a will.

Secondly, Neither can it be a sufficient *appointment of the uses* of a surrender made to the use of a WILL; when it is *not a will* at all, nor even a testamentary appointment.

Thirdly, Nor can it operate as a REVOCATION of the former will. Here are no *words* of revocation; no declaration of an inclination to it: *no such intention* appears. Revocations are *not favoured* now: the statute of

* 29 C. c. 3.

* frauds, settles the point in what manner they shall

be made. Feoffments to uses, bargains and sales inrolled, and grants operate by relation to the lifetime of the testator: and a feoffment without livery, a bargain and sale without inrolment, or a grant without attornment, are only incomplete. But a mere covenant "to make a feoffment in fee," without more, is no revocation of a will: as was determined in the case of *Montagu v. Jeffereys*, in *Moore*, 429. and 1 *Ro. Abr.* 615. pl. 3.

1761.
CLYMER
V.
LITTLER.

Little or nothing is to be found about revocations of wills of copyhold lands. But it has never been determined "that a will of copyhold is not within the revoking clause of the statute of frauds."

A will of copyhold lands can not now be revoked by *parol*: it must be by some other will declaring the same. In the case of *Eggleston et al' v. Speke*, 3 *Mod.* 258. the second will did not operate as a revocation of the former; because it was not a good will in all particulars, and there was no such declared intention. *Carlhew*, 79. S. C. [1253]

But a mere covenant and agreement will not revoke a will, 1 *Ro. Abr.* 615. pl. 3. title *Devise*, letter P. And yet that was a covenant in pursuance of a marriage: which makes it a very strong case.

The words "constitute and appoint" are not testamentary words: nor is there any publication of this writing. It is not under seal: which it ought to be, in order to revoke what is under seal. Therefore as an appointment, it cannot revoke the former will. It ought also to have been done in the presence of three witnesses by the statute of frauds. The twenty-second section takes care of the revocation even of wills of personal estates; though it does not meddle with the making them. And this is a ground for a presumption "that the legislature considered copyhold wills to be within the provision of the statute, as to the revocation of THEM, too."

The revocation in the present instance, must be extended to the will of the freehold as well as of the copyhold, if it operates at all: it can not operate as a revocation of part of the former will, and not as a revocation of another part. It must be an intention to revoke the whole: it must intend to give to another, as well as to take from the former. In the case of *Onions v. Tyrer*, 1 *Williams* 345, Lord Comper argues upon this principle, "that if the second devisee took nothing, the first devisee could lose nothing." But in this case now before the court, nothing is given to any other person. This covenant is no revocation of a will. 2 *Peere Williams* 623. *Cotter v. Layer*. And it can not take effect as a testamentary revocation.

The defendants can not be purchasers for a valuable [Note, The will under which the plaintiff claimed was proved in 1757.]

1761.
CLYMER
v.
LITTLER.

consideration, under a public notoriety; and *without notice* of our claim. All the purchasers were *under notice* of a will: and the defendants consulted counsel upon the validity of it.

This evidence is *admissible*; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of *murder*. So that it ought not to be called " *MERE hearsay* " evidence."

But their objection comes *too late*; as it was *not taken* upon the trial: they even *cross-examined* the witness. So is *Lucas's Rep.* 202, 203. *H. 12 Ann. B. R. Queen v. Corporation of Helston*—" If counsel do not, at the trial, insist upon an objection, there ought to be no new trial." *H. 2 G. 2. Fitz-Gibb.* 40. Anonymous. Mr. Lee moved for a new trial, because his client had made a mistake in point of evidence: and it was denied; because " *vigilantibus non dormientibus jura subseruiunt.*"

[1254]

This express evidence of the direct *forgery* came out upon Mr. Knowler's *CROSS-examination* of our witness (this *Mary Victor*;) *not upon our* examination of her.

Mr. Norton, in reply.—This will of 1745, says " I appoint *my lands to come to and be given to, &c.*" It can not be a covenant to stand seised: there is *no seal, no covenant*; and besides, it is *copyhold*; of *which* there can not be a covenant to stand seised. It must operate as a *revocation*.

Wills of *copyholds* are *not* within the statutes of frauds; either as to the *making* or as to the *revocation* of them. They stand just as they did: the *revoking* clause can never extend to them, when the *enacting* clause does not.

As to the case of *Eggleston et al. v. Speke*, 3 *Mod.* 258.—The nature of the estate is different from this. This is a revocation of the will *in toto, quoad* the *copyhold* land.

A will may be *good as to copyhold*; though *bad as to freehold*: therefore so also may a *revocation* be.

An instrument may operate *as a revocation*; though it be void as to its professed end and intention: as, for instance, a will devising land to a papist.

As to the case in 1 *Peere Williams* 345.—There was *no intention* to revoke the will, and let in the heir at law.

But in the present case, the two acts of the testator are *inconsistent*. This is *not a covenant to do* the thing; but *actually doing it*: it does *not rest in futuro*.

Nothing passes by a feoffment, without livery; or by a bargain and sale, without inrolment; or by a grant with-

out attornment : and therefore in such case, there can be no reference backwards.

1761.

Lord MANSFIELD—The defendants came to the trial, apprized of the plaintiff's title, and prepared to encounter it.

CLYMER
V.
LITTLER.

There is no doubt as to the will of 1743; which is the plaintiff's title. The only answer to it, which the defendants now alledge, is "that the instrument of 1745 has revoked it." And they do not suggest that they can give any new evidence in support of that instrument or the point of revocation. The jury have found for the plaintiff: consequently, "that the will of 1743 was not revoked." Lord Chief Justice *Willes* is satisfied with the verdict. This motion therefore and the argument in support of it, as there is no pretence that the defendants can mend their case upon a new trial, is in the nature of an appeal from his opinion. [1255]

There are three grounds, any one of which, if made out, is sufficient to support this verdict. If the instrument of 1745 was *forged*; if it was *obtained by fraud and imposition*, though not forged; or, though duly and fairly executed, if it be no revocation. [S Brown, 159.]

As to the first ground, the defendants complain, that the chief justice misdirected the jury, by leaving to them as evidence the declaration of *Medlicott* "that he forged it."

Answer. It came out upon their *own* examination; they made no objection to it at the trial; and it certainly was a circumstance *proper* for the jury to consider. The competence of evidence depends upon the circumstances under which it is given. The will of 1743 is set up after fifteen years. It was necessary to shew how it was secreted, and how discovered. (a) The declaration of *Medlicott* in his last illness, when he produced and delivered it for the use of the plaintiff, is allowed to be competent and material evidence. The instrument of 1745 was equally in his custody and secreted. The account he gave of it in his last moments is equally proper. Even though it had been upon an examination by the plaintiff, (especially as it was all written and witnessed by him, and gave the premises in question to his wife,) as the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience; I am of opinion "the evidence was proper to be left to the jury."

(a) But above a year and three months after the testator's death, before the lessor had the custody of the will by which he claimed. *Vide ante* 1246.

1761.
CLYMER
v.
LITTLE.
[1256]

But independent of this declaration, *forgery* or *fraud* was *apparent*. *Medlicott* appears to have been a bad man. It is all written by him, and gives the fee to his wife, in prejudice of *John Clymer's* male issue. It is worded as an irrevocable settlement; without cause or consideration. *Medlicott* never dared to produce it; and chose rather to conceal the will of 1743, that the younger son might be admitted and possess the premises.

[Vide 2 Black. Rep. 1114. and Cox's note in 2 P. Wms. 258]

But lastly, this paper is no *revocation*. It is no will: and therefore can not direct the uses of the surrender. It is no conveyance. It is no agreement with any body. It does not purport having been delivered to or for the use of any body. There is no proof that it was out of the custody of *John Clymer*, before his death. It ought not to have been out of his custody; because it is voluntary and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying "that he *intended* to make a will or surrender to the use of his daughter, in fee:" and *did* neither. An intention to revoke by a future act which a man can not be compelled to perform, is no revocation, till the act is *done*. All the cases are so: and the reason is evident.

[8 Vin. 134. pl. 1, 2, 3, 4.]

It is to no purpose, to grant a new trial; because I am satisfied that the verdict is, in every light, agreeable to the true justice of the case.

Was it a measuring cast, or if the defendant had been surprised by the plaintiff's title, I should have thought otherwise.

The defendants are purchasers from the heir of a copyholder duly admitted. There has been a possession above fifteen years. The title set up by the plaintiff is a will *concealed*. (a)

(a) If this had been by the plaintiff's lessor, it would, as it should seem, have been a fraud in the plaintiff's lessor to conceal the will and suffer the estate to be sold by the heir and several others claiming under him, all of whom were admitted; and therefore, if this had been the fact, a court of equity at least would have enjoined the heir from setting up the will, according to the principle in the cases in *Eq. Abr.* 284. And it seems a jury ought under such circumstances to have found against a will, so concealed by the devisee in fee; but qu. the fact of concealment; for the will was proved in 1751, ante 1246; which seems to be the strongest part of the plaintiff's case: or rather that and a defence founded on forgery, seem to be the only answers to the arguments from the admission of the customary heir, and the many admissions of the purchasers under him before any suit

But, be these favourable circumstances as they may, the trial had is satisfactory beyond a doubt: and the defendants can not mend their case. Therefore it would be vain and vexatious, to grant a new trial.

The three other judges declared their entire concurrence; but declined expatiating upon it, or entering into particulars, as Lord *Mansfield* had so very fully gone through it.

Per Cur'.

The RULE must be DISCHARGED.

REX versus JAMES WHEELER.

Monday, 23d

Nov. 1761.

THE defendant came up, to receive the judgment of the court; having been reported in contempt.

[1 Black. 311.]

The contempt was this—the defendant *Wheeler*, being a vintner, had bought two pipes of wine of one *James Stuart Tulk*: which wine the defendant asserted to be adulterated and bad, and therefore refused to pay for it.

Defendant

[1257]

discharged without fine for a contempt in attempting to set aside an award in equity.

Whereupon *Tulk* brought his action against him for the price. At the trial the matter was, by CONSENT of both parties, (probably, to conceal the secrets of the trade, and the nature and degree of mixing,) referred to the arbitration of one Mr. *Charles Corderoy*: *Wheeler* consented to abide by his award, and NOT to bring any bill in EQUITY. This rule of *nisi prius* was made a rule of this court. *Corderoy* awarded “that *Wheeler* should pay *Tulk* a certain sum of money, (about 20l.) for this wine.” *Wheeler*

commenced by the lessor: it is true, that the defendants were not privy to the forgery, which weakens the presumption against them, on that account. On the whole, the facts stated, *ante* 1246, seem to have been the grounds of the judgment in this case; they are four, and some observations are made on each of them in the notes. Qu. if any of them warrant the judgment? and qu. if the better ground would not have been the probate of the will in 1751, and the attempt of defeating the plaintiff's claim by forgery? Qu. also, whether *John Clymer* the testator made any surrender to the use of his will? if he did not, the legal estate at least, would have been in the defendants; and therefore the judgment is wrong if this be so; and as the devise was to a grandchild, it is very doubtful whether a court of equity would supply the want of a surrender (see 1 P. Wms. 60, 61.); and if equity would do it against an heir at common law, yet qu. whether they would against a customary heir, having no other provision, which seems to have been the present case. See 2 P. Wms. 505.

1761.
 REX
 v.
 WHEELER.

refused to pay the money awarded; and moved this court "to set aside the award."

Upon hearing that motion, the court thought there was no ground to set aside the award; but that it ought to be performed. Upon which, the defendant performed the award, and paid the money. Afterwards, he was so ill advised as to bring a long bill in the court of Chancery.

The plaintiff here (defendant in equity) moved this court for a rule to shew cause why an attachment should not issue against him, for bringing a bill in equity, contrary to the rule of this court made by consent.

Upon the motion, the court expressed their resentment, and made a rule to shew cause.

The vacation then coming on, the defendant filed a supplemental bill in Chancery, stating the motion for an attachment, and praying an injunction and relief.

The plaintiff here (defendant in equity) pleaded, in bar, the rule of this court: which plea was allowed.

Upon shewing cause here, against the attachment, the court, from abundant indulgence, heard, a second time, every thing which could be said to impeach the award. But they continued of their former opinion, in support of the award: and the rule for the attachment was made absolute of course.

He was taken up upon the attachment: and interrogatories were filed. He was examined: and the interrogatories and examination were referred to me. I reported him in contempt: for he explicitly *owned* the fact of bringing an original and supplemental bill in Chancery; though [1258] he pretended that he did not understand that he had ever consented "not to bring a bill in equity," nor ever meant any such consent.

Afterwards, upon his being driven to the brink of commitment, he was forced to submit: and it was referred to me to inquire "whether he had procured the bill brought "by him against *James Stuart Tulk*, *Charles Corderoy* "and *James Jefferson*, in the court of Chancery, to be dismissed;" and also to liquidate and ascertain the amount of the costs out of purse of the said *James Stuart Tulk*, *Charles Corderoy*, and *James Jefferson*, occasioned by his having filed a bill and proceeded in Chancery against them, in contempt of the order of this court. And the court adjourned the consideration of the judgment for his contempt, until after I should have made my report.

Immediately after the making this rule, the defendant dismissed his bill in Chancery; and readily attended and submitted to the taxation of all the costs which the three persons mentioned in the rule had been put to, out of pocket, as well in the court of Chancery as in this court, arising from his contempt: all which costs, (which were amply

allowed, pursuant to an intimation from the court "that they ought to be so," and amounted to 87l. 4s. he immediately paid: and perhaps his own might be as much more, at least.

1761.

RUX
v.

WHEELER.

All which was now laid before the court: and nothing remained, according to the *ordinary* course of proceeding, but for the court to have passed judgment upon him for his contempt.

THE COURT was unwilling to punish him further, by *fine* and *imprisonment*; as he had smarted severely: and yet, as his contempt was so obstinate, they did not care that a *slight* sentence should stand upon their records.

Therefore they waved giving *judgment*, by *consent*.

They said, they would not receive more complaints *now*, upon this occasion: but that the attorney and counsel were equally guilty of the contempt, and more criminal; and if it ever happened again, they would proceed against *them*.

Note—This case is a strong proof how far a contentious spirit, with bad advice, may go. The sum awarded was but about 20l. The cause in Chancery went no farther than a plea: if it had proceeded to an examination of witnesses and a hearing, the costs must have been considerably more. And it was without the least chance of success: for, every ground of relief in equity, against an award, is *equally* open in *THIS* court; upon a motion, in a summary way, "to set it aside."

1259]

No man would accept of being an arbitrator, if he was liable to be harassed with a Chancery-suit for his pains.

THE COURT (for the reason above given) only made a rule that this RECOGNIZANCE should be DISCHARGED.

ROE, ex dimiss. DUKE of BOLTON, versus GRANTHAM.

Tuesday, 24th
Nov. 1761.

THIS cause stood in the paper, for argument of a special verdict found at the assizes for the county of *Devon*, upon an ejectment brought by the present Duke of Bolton for lands in *East Portlemouth* in that county; part of the estate which had once belonged to *Robert Willoughby Lord Broke*, and which had been settled by a *private act of parliament* made in 27 H. 8. upon the ancestors of the present Duke of Bolton, with a clause to restrain alienations, except for the *jointures of wives for term of life*, &c.

Power of
jointress to
make leases
not expressed
cannot be im-
plied.

The special verdict was long; and there was a long argument upon it, at the bar: but the question was no more than "whether the Duchess of Bolton could lease the lands settled upon her for life, under the power given by the exception in the said act: for *three lives*, or

1761.
ROE,
ex dimiss.
DUKE OF
BOLTON
V.
GRAN-
THAM.

" years determinable upon *three lives*; that being the usual manner of leasing in the county where those lands lay, and the usual manner in which they had been leased."

THE COURT was clear " that such power *not* having been *given* to jointresses by the said act of parliament, " could *not* be IMPLIED." It would therefore be of no use, to report the case at large.

Per Cur.'

JUDGMENT for the PLAINTIFF.

Friday, 27th
Nov. 1761.

MIDHURST *versus* WAITE.

[S. C. 1 Black.
350.]

Deputy high
constable may
billet soldiers.

[1260]

UPON a motion for a new trial—

It appeared upon the report of Mr. Justice *Wilmot* who tried the cause, that this was an action brought by an alehouse-keeper in the hundred of *Evinger* in *Hants*, against a *DEPUTY high constable*, for billeting soldiers upon him; and that the high constable living at a distance, had appointed the defendant his deputy, by *parol* only; and to do this business of quartering soldiers for him, during the whole time of his continuance in that office.

[See 7 Vin.
556, 557.
2 Durn. 403.]

The questions were—(First) whether a *high constable* is a *common-law* officer: (Secondly) whether a *high constable* is *within* the word "CONSTABLE" in the annual mutiny act, so as to empower him to *billet soldiers*; and (Thirdly) whether a high constable can appoint a *deputy* for this purpose.

Mr. Justice *Wilmot* reported, that at the trial, he was of opinion in the *affirmative*, on all the three points.

* 9 Co. 46.
Earl of
Shrewsbury's
case.

[See also 7 Vin.
537. pl. 7. and
qn. if the
point be any
where in 9 Co.]
† 1 Ro. Rep.
274. *Phelpe v.*
Winscombe.

Mr. *Thurlow* and Mr. Serjeant *Davy*, on behalf of the plaintiff, argued to the contrary: and particularly insisted that the deputation ought, at least, to have been in *writing*, * and also that the deputy could not billet them in his *own* name.

The constable of the hundred can not billet soldiers, in *places* where there are other officers: the act only gives him this power in the *absence* of the officers of the place. This appears particularly from § 35, 36. of this act. So, by 2, 3 *Ed. 6. c. 10.* about making malt, the power of viewing it is given to the constable of the town where it shall be made or put to sale.

Secondly, but, at least, he could *not* appoint a *deputy* for this purpose. This person, the now defendant, was *never* *approved* of nor *sworn*.

In the act of 1 *W. & M. c. 18. § 7.* there is a provision about dissenters chosen constables, "that they may execute the office by a deputy that shall comply with the

"law." But the person appointed under this act could not be a deputy, but a constable in his own right. 1761.

No judicial officer can appoint a deputy. *Phelps v. Winchcombe*, 3 Bulstr. 77. 1 Ro. Rep. 274. *Moore* 845. MIDHURST
v.
WAITE.

2 *Dane*. 482. pl. 1.

An under sheriff can not exercise a judicial act. *Hob.* 13.
Sir Daniel Norton v. Simmes. *Noy*, 21 *Bandal's* case.

A high constable is, in some respect, a judicial officer : and the *billetting of soldiers* is a judicial act. This act is the effect of the judgment of the agent : and an appeal is given from his act. [1261]

By 9 *Ed.* 4. fo. 31. A sheriff can not make a deputy to take security upon a supplicavit; though, to take the party, he may.

Mr. Webb contra, for the defendant.

First. A high constable is included in the mutiny-act : the words are " constable, tything-man, head-borough, or " other officer."

Secondly, He may make a deputy for this purpose.

First—He argued from the act itself.

Lord MANSFIELD—Surely, it is impossible, to maintain that a high constable is not within the act."

Mr. Webb—Proceeded to the

Second point—He may appoint a deputy upon this particular occasion.

3 *Bulstr.* 77. *Phelps v. Winchcomb*. 3 *Keb.* 309. [S. C. and S. P. 1 *Siderf.* 355. are cases of standing deputies : and Lord *Moor*, 845. *Hale* adopts all the doctrine laid down in the case of 1 *Roll Rep.* 274.] *Phelps v. Winchcomb*.

Taking security is a judicial act.

The counsel for the plaintiff, in reply, confined themselves now to the second question.

This is a permanent, constant, general deputy, as to all acts of this kind : not a deputy *pro et vice*.

Lambard supposes the case of *Phelps v. Winchcomb* to have proceeded rather upon toleration, than upon law.

In this instance, the duty is judicial; and the appeal proves " that this was the idea of the law."

If a man be bound by tenure, to execute the office of constable, and appoint a substitute, that substitute himself is sworn in : he is not a deputy. [*Lev.* 339.]

An under-sheriff can not execute a writ of partition.

Lord MANSFIELD—All these niceties were never thought of, by those persons who have for many years drawn the mutiny-acts. They are not drawn by gentlemen of the profession of the law. And the nature of the thing, as well as the intention of the legislature, requires that people should not be liable to actions for honestly executing them. [1262]

1761.
MIDHURST
v.
WAITE.

These acts are intended to guard the *civil* authority against the *military*.

The act now under consideration certainly *comprehends* a *high* constable: and he *may appoint a deputy to this particular ministerial act*. This is a *ministerial* act: and a constable may appoint a deputy to do *ministerial* acts.

It is taking the definition *too large*, to say "that *every* act where the judgment is at all exercised, is a *judicial* act:" a judicial act is supposed to be done *pendente lite* (of some sort or other.)

This construction is the most convenient, and agreeable to the rule of law in cases of appointing deputies.

Mr. Justice DENISON concurred in opinion with his lordship.

So also did Mr. Justice FOSTER: and

Mr. Justice WILMOT continued of the same opinion he was at the time of the trial.

He said, he would only now add, that he had looked a good deal into the nature of the office of high constable; and that he found it to be much more ancient than the time of *Ed. 4.*

Per Cur. unanimously,—

RULE DISCHARGED.

Saturday, 28th
Nov. 1761.

REX versus GEORGE SCOTT and EDWARD HAMS.

[S. C. 1 Black-
291 350.]

If four are indicted for a
[1263]
riot, and two die before
trial, judgment against
the surviving two shall not
be arrested.

THIS was an indictment for a riot; and consisted of two counts only; there being no count added, for an assault.

The first count charged that *George Scott, Lewis Delavoux, Samuel Austin, Edward Hams, Walter Bray, and John Chaplin*, with force and arms, at, &c. in the street and common highway there, called the *Strand*, unlawfully, violently, and *routously* did assemble and gather themselves together, to disturb the peace of our said lord the king: and so being then and there assembled and gathered together, they the said *G. S. L. D. S. A. E. H. W. B. and J. C.* then and there unlawfully, *riotously* and *routously* did follow and walk after one *Felix Sarrant*, gentleman, then and there passing along the *Strand* aforesaid, and then and there being in the peace of God and of our said late lord the king, from and out of the *Strand* aforesaid, unto the dwelling house of him the said *F. S.* situate in *Blue-Cross-Street* in the parish and county aforesaid, insulting, abusing, menacing, and hollowing after him the said *F. S.* whereby he the said *F. S.* was then and there put in great peril and danger of losing his life; and other wrongs to the said *F. S.*

then and there unlawfully, *riotously* and *routously* did, &c. &c. 1761.

REX
v.
SCOTT
and HAMS.

The second count charged that *George Scott, Lewis Delavoux, and Edward Hams*, with force and arms, at, &c. in the said street and highway there, called *Blue-Cross-Street*, near the dwelling-house of the said *F. S.* there situate, unlawfully, *riotously* and *routously* did assemble, and gather themselves together, to disturb the peace of our said lord the king, (he the said *F. S.* then being in the same house and in the peace of God and our said lord the king;) and so being then and there assembled and gathered together, they the said *G. S. L. D. and E. H.* did then and there unlawfully, *riotously* and *routously* make, and cause and procure to be made, a large fire in the street and highway aforesaid: and in the same fire then and there unlawfully, *riotously* and *routously*, did burn, and cause to be burnt, him the said *Felix Sarrant* in effigy: and they the said *G. S. L. D. and E. H.* then and there unlawfully, *riotously*, and *routously* did remain and continue in the street and highway aforesaid, near the fire aforesaid, for a long time (to wit, for the space of two hours and upwards,) hollowing, shouting, firing guns, squibs, and fireworks, and misbehaving themselves; and other wrongs to the said *F. S.* then and there unlawfully, *riotously*, and *routously*, did, &c. &c.

Mr. Morton had (on *Saturday* the 30th of *May* last) moved in arrest of judgment: for, that *only two* of the defendants had been convicted; *the * rest* having been acquitted. Whereas *three* persons, at the least, are necessary to constitute a riot: and as this is an indictment for a riot, and *only two* are found guilty, there can be *no judgment* given against them.

* The fact was, that two died, two were acquitted, and two convicted.

And to prove "that if several persons be indicted for a riot, and two only found guilty, and the others all acquitted, judgment shall be arrested, because a riot cannot be committed by two persons only;" he cited *Popham*, 202. *Harrison v. Errington*, (the second error assigned;) also *Rex v. Sudbury, Heapes*, and others, 1 *Ld. Raym.* 484. 2 *Salk.* 593. and 12 *Mod.* 262. all *S. C.* in point. And if another offence be added in the same count, it does not vary the case: so is *Rex v. Colson*, et al', 3 *Mod.* 72.

Mr. Norton and Mr. Stow now shewed cause, on behalf of *Sarrant* (a quack doctor) the prosecutor, why judgment against the defendants should not be arrested.

It has been objected "that it being an indictment for a riot, and no other count laid, *three* persons at least ought to have been found guilty; or else, it can be *no riot*."

[1264]

1762.
 REX
 v.
 BARKER,
 et al'.

a service, or exercise a franchise; (more especially, if it be in a matter of public concern, or attended with profit;) and a person is kept out of possession, or dispossessed of such *right*, and has *no other* specific legal remedy; this court ought to assist by a *mandamus*; upon reasons of *justice*, as the writ expresses—*Nos A. B. debitam et festinam justitiam in hac parte fieri volentes, ut est justum*;" and upon reasons of public *policy*, to preserve peace, order, and good government.

The interposing this writ where there is *no other specific* REMEDY, is greatly for the benefit of the subject and the advancement of justice. The speedy decision of the question, in that case which has been mentioned, by an immediate trial in a feigned issue shews it.

This case is not indeed quite the same as that was; but still it is reasonable to grant a rule to shew cause.

On *Monday*, 23d *November* 1761, Mr. *Thurlow* and Mr. *Dunning* shewed cause against the *mandamus*.

They controverted, by affidavit, the election of *Mends*; and endeavoured to support the election of Mr. *Hanmer*, whom the trustees had put into possession.

The majority of the congregation seemed to be on the side of *Mends*: the trustees espoused *Hanmer*, and meant to maintain him with a high hand.

There was no colour for the election of *Hanmer*: and that of *Mends* was liable to objections.

This contest had raised great animosity, spirit, and obstinacy: especially in those who were for *Hanmer*; and as they thought their strength lay in throwing obstacles in the way of *any* (more especially a *speedy*) redress, as *Hanmer* was upholden and maintained in possession by the trustees; their counsel, with great earnestness and ability, argued against making the rule absolute for a *mandamus*; and contended that it could not be "to *admit*," where another was in *possession*.

[4Burr.2188.] A *mandamus* "to *admit*" goes no further (they said) than to give a *LEGAL possession* where otherwise the party would be without remedy. And to prove the distinction between a *mandamus* to *admit* and a *mandamus* to *restore* to a former possession—they cited the case of *Rex v. Dean and Chapter of Dublin*, 1 Sir J. S. p. 538. per *Pratt*. "A *mandamus* to *admit* is only to give a " *legal*, not an actual possession; though in a *mandamus* " to *restore*, the court will go further."

[1267] But here, another person (Mr. *Hanmer*) is in *possession*: and Mr. *Mends* never has been so. Here is *no LEGAL right*: and this court can *not take notice of TRUSTS*, so as to give relief, upon an *equitable* title only. Nor is this gentleman the *cestuy qui trust*: at most, his title is *only equitable*.

Lord MANSFIELD—A *mandamus* is a prerogative writ; to the aid of which the subject is intitled, upon a proper case previously shewn, to the satisfaction of the court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there *ought* to be one.

Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice.

The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a *right*, and *no other* specific remedy, *this* should not be denied.

Writs of *mandamus* have been granted, to admit *lecturers, clerks, sextons, and scavengers, &c.* to restore an alderman to precedence, an attorney to practice in an inferior court, &c.

Since the act of toleration, it ought to be extended to protect an endowed pastor of protestant dissenters; from analogy and the reason of the thing.

The *right itself* being *recent*, there can be no *direct ancient* precedent: but every case of a lecturer, preacher, schoolmaster, curate, chaplain, is in point.

The *DEED* is the foundation or endowment of the pastorate. The form of the instrument is necessarily by way of trust: for, the meeting-house, and the land upon which it stands, could not be limited to *Enty* and his successors. Many lectureships and other offices are endowed by trust-deeds. The *right* to the function is the *substance*, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows, by necessary consequence, the right to the function of minister, preacher, or pastor; as much as the *insignia* do the office of a mayor: or the custody of the books, that of a town-clerk.

Mr. Just. WILMOT—It has been granted in the case of scavengers. It is a *prerogative writ*, and shall be granted to amplify justice, and to preserve a right; where there is no specific, legal remedy; where no assize will lie.

Mr. Just. FOSTER—Here is a *legal right*. Their ministers are tolerated and *allowed*: their right is *established*, therefore is a *legal right*, and as much as any other legal right.

1762.

REX
V.BARKER,
et al'.[3 Black.
Com. 110.]

[1268]

1762.

REX

v.

BARKER
et al.

N. B. This Mr. Hammer was in possession, and claimed to be duly elected to the same ministry or pastorate.

THE COURT proposed an *issue* to try "whether Mr. *Hammer* was or was not *duly elected*;" as the cheapest and best way to put it in.

It was then adjourned to the first day of this present *Hilary* term, in order that the parties might give an answer, "whether they would agree to *this issue*;" or "whether they would agree to proceed to a *new election*:" and the parties themselves to be consulted, and make their election.

But afterwards, (on Tuesday 24th *November* 1761,) Lord MANSFIELD proposed and made an alteration in the rule to be drawn up in this case: which alteration he judged to be necessary, as Mr. *Hammer* himself was *no* party to this litigation about the *mandamus*.

He therefore directed it to be drawn up to the following effect, (and indeed gave the very words;) *viz.*

It is ordered, that the first day of next term be given to *Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang*, to shew cause why a writ of *mandamus* should not issue, directed to them, requiring them to admit *Christopher Mends* to the use of the pulpit in a certain meeting-house appointed for the religious worship of protestant dissenters commonly called *Presbyterians*, in *Plymouth* in the county of *Devon*, as pastor, minister, or preacher there. And it is further ordered, that they the said *Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang*, do at the same time acquaint this court "whether they insist upon the validity of the "election of *John Hammer*;" and if not, "whether they "are willing to proceed to a new election of a minister, "pastor, or preacher there;" the prosecutor of this rule having declared his consent "to wave his claims, in order "to a new election." And it is further ordered, that notice of this rule be given to the said *John Hammer*; to the intent that he may be heard, as he shall be advised; and that he may acquaint this court "whether he insists "upon the validity of his election," and "whether he is "willing to have it tried in a feigned issue."

Mr. THURLOW and Mr. DUNNING now give an answer, by direction of their clients, "that *Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang*, do "insist upon the validity of the election of *John Hammer*; "and that they are *not willing* to proceed to a new "election, &c. and that the said *John Hammer* does insist "upon the validity of his election, and is *not willing* to "have it tried in a feigned issue."

After which Mr. THURLOW and Mr. DUNNING were heard again, in general; and argued strenuously against granting a *mandamus*. They knew, the election of *Hammer* could not be supported upon a trial. The election

of *Mends* seemed liable to objection as irregular. But, if the matter was *proper* for a *mandamus*, they were aware that in case *neither* was elected, the court would issue a *mandamus* "to proceed to an election:" in which case, the majority of the congregation were inclined to *Mends*. The trustees therefore obstinately persisted in opposing a *mandamus* and refusing a trial.

LORD MANSFIELD—Every reason concurs here, for granting a *mandamus*. We have considered the matter fully: and we are all clearly for granting it. I have made a collection of cases on this subject, since the last argument: but I have it not here, at present.

Here is a *function*, with *emoluments*; and no specific legal remedy. The right depends upon election: which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the court deny this remedy, the congregation may be tempted to resist violence by force: a dispute "*who shall preach christian* [11 Co. 99.] "*charity*," may raise implacable feuds and animosities; in breach of the public peace, to the reproach of government, and the scandal of religion. To deny this writ, [1270] would be putting protestant dissenters and their religious worship, out of the protection of the law. This case is *intituled* to that protection; and can not *have* it in any *other* mode, than by granting this writ.

The defendants have *refused* either to go to a new election, or to try it in a feigned issue.

We were, all of opinion, when a trial was proposed to them, that a *mandamus* ought to issue, in case of a refusal. Their answer ought to be put into the rule, as prefatory to it: and I do this, with a view that their refusal may be authentically given in evidence to the jury, upon a trial.

Many cases have gone as far as this, or farther.

Mr. Justice DENISON, Mr. Justice FOSTER, and Mr. Justice WILMOT, all declared themselves of the same opinion.

THE COURT ordered a *mandamus* to issue.

V. Post. Pa. 1379, 1380. 28th April 1763.

REX *versus* HEYDON, and four others.

*SIR FLETCHER NORTON shewed cause on behalf of the prosecutor, why the proceedings upon this *joint* information should not be stayed, with costs to be paid by the prosecutor; for that five *separate* rules "for one or more informations against each defendant" are *conso-* A joint information against several on distinct rules, will not be granted. general.

* Mr. Norton was this day knighted, and made solicitor general.

VOL. III.

D

1762.

REX

v.

BARKER,
et al.

[11 Co. 99.]

[1270]

Monday, 25th
Jan. 1762.

[1 Black. 351,
356. 404.]

1762.

REX

v.

NORTON.

Admitted into this *one joint* information, without any rule for such a joint information against *all* of them.

Mr. Serjeant Nares, *contra*, insisted that by the practice, this can *not be done*; nor does the *present rule* justify it.

Mr. ATHORPE (secondary) being asked, concurred with Mr. Serjeant Nares, "that there was no authority by any rule, or by the practice, for filing this *one joint* information against *all* the defendants."

Sir Fletcher Norton replied, that if the *offence* be joint, there may be a joint information.

[1271]

Lord MANSFIELD—But the question is, whether it can be done upon these several and distinct rules, which were taken upon the motion of *several different gentlemen*, who only applied for one or more informations against *each* defendant, but without any general motion for a *joint* information against them all.

Sir Fletcher Norton—It must be allowed, I agree, that one man's guilt is not the guilt of another: but this case is a *joint act* of bribery, upon which we can convict *all* of them; but yet the evidence may not be sufficient to convict the individuals separately.

Mr. Justice WILMOT was not satisfied of that; and seemed to doubt whether the same evidence which would be sufficient to convict *all jointly*, would not be sufficient to convict each one alone separately.

Lord MANSFIELD said he was clear that this *joint* information against all, was wrong, upon these *separate and distinct* rules for one or more against each; and that the present rule must be made absolute.

RULE made absolute for staying the proceedings upon this *joint* information.

Tuesday, 26th Jan. 1762. CHURCHWARDENS of St. SAVIOUR'S SOUTHWARK *versus* SMITH.

[S C. 1 Black. 351.]

Assignee of a lease after a breach of covenant by the lessor, not liable for the breach.

THIS was an action of covenant against the *assignee* of a term.

The declaration set forth, that by indenture dated the 23d of *January* 1702, the then churchwardens demised the premises to one *James Richards*, for sixty years and three-quarters from the date of the indenture; that *James Richards* covenanted to repair, and to pay the rent, &c. and also covenanted to pull down the houses that stood on the east front of the premises, and to *build new houses* thereupon, *WITHIN seven years*; that *James Richards* entered on the 23d of *January* 1702, and assigned to the defendant *Richard Smith*; and that the premises were ruinous.

The first breach was assigned, in not repairing: the defendant pleads "that the premises were not ruinous, &c." And upon this plea, issue was joined: so that it is, at present, out of the case.

The second breach (upon which the question arises) was assigned, in not pulling down the old houses, and building new ones; viz. "That James Richards, the original lessee, did not do it before the assignment; nor has the defendant, the assignee, since the assignment."

The defendant pleads *actio non*, &c. for that "the estate did not come to him by assignment, till AFTER the expiration of the seven years." The plaintiff demurs: and the defendant joins in demurrer.

The only question was, "whether the ASSIGNEE be answerable for the breach incurred BEFORE the assignment."

Mr. MORTON, for the plaintiffs, argued "that he was." He said that as the thing was to be done UPON THE LAND, the covenant would run with the land and bind the assignee: though, he admitted, it would be otherwise, if the thing covenanted to be done was collateral to the land. And he would have had it supposed that the present case was within both the first and second resolutions in *Spencer's case*, 5 Co. 16. and agreeable to the cases in *Cro. Eliz.* 457, 552, 553. *Moore* 159, and 1 *Jones* 223.

And though here is a limited restricted TIME fixed for the performance of the thing covenanted to be done, yet that makes no difference, he said, as to the assignee: for the restriction is collateral to the covenant; and is rather prejudicial than advantageous to the reversioner, as it is the better for him, the later it is done.

But THE COURT were very clearly of opinion against him; without hearing Mr. Yates, who was for the defendant.

Lord MANSFIELD said, the single question was, "whether an assignee is liable for a breach which he never committed." And it is certain "that he is not." This breach was committed before his time: and this covenant does not run with the land.

Mr. Justice DENISON * and Mr. Justice WILMOT concurred; and observed that it was so settled in the case of

† *Green v. Green*. P. 12 W. 3. B. R. 1 Salk. 199.

"Lessees covenanted for him and his assigns, to rebuild

"and finish a house within such a time: after that time,

"he assigned; the house not being built and finished.

"Per Holt Chief Justice, this covenant shall not bind the

"assignee; because it was broken before the assignment:

"aliter, if broken after; as if the lessee had assigned

"before the time expired."

JUDGMENT for the DEFENDANT.

D 2

1762.

ST.

SAVIOUR'S

ROUTH-

WARK

V.

SMITH.

[See Str. 1271.

6 Vin. 411.

pl. 6.

1 Lutw. 363.

2 H. Bl. 134.]

[See 3 Wils.

29. 32.]

[1273]

* Mr. J. Foster

was absent.

† V. Holt, 177.

1769.

STEPHEN-

SON

v.

HILL.

Customary
tenant's pre-
scribing in non
decimando.

[See Fortesc.
Rep. 44.]

STEPHENSON, Gent. *versus* HILL.

THIS was an action brought upon the statute of 2 E. 6. c. 13. for the payment of tithes of corn and grain. (a)

The defendant pleaded the general issue, "*nil debet*": and the cause came on to be tried before Mr. Justice Bathurst at Appleby assizes, 14th August 1760.

Upon the trial, it appeared that the lands whereon the corn mentioned in the declaration grew, were and immemorially had been CUSTOMARY LANDS, parcel of the manor of Morland, in the county of Westmoreland, and holden of the lord thereof for the time being. (b)

[1 Black. L.T.
144. 2 Rol.
Abr. 120 (b)
1 Ld. Raym.
43]

It also appeared that the said manor of Morland, and the appropriate rectory of St. Michael Appleby, were parcel of the possessions of the PRIORY of Wetherail, in the county of Cumberland, which was one of the larger dissolved monasteries and was vested in the crown by virtue of the stat. 31 H. 8. c. 13. And that the PRIOR of the said priory at the time of the dissolution was and had been time immemorially seised of the said manor with the appurtenances, in his demesne as of fee, in right of his PRIORY; and also of the APPROPRIATE RECTORY of St. Michael Appleby, and the tithes there.

[1274] It also appeared that the said manor and appropriate rectory being so vested in the crown, the same was in due manner granted to the DEAN AND CHAPTER of the holy and undivided Trinity of Carlisle, in fee; and that they are still seised in fee, in right of their church; and that the present defendant was the CUSTOMARY TENANT and occupier of the said lands whereon the said corn grew, during the time in the declaration mentioned; and HELD the same of the said DEAN AND CHAPTER, as of their said manor of Morland.

That the plaintiff is farmer of the corn and grain tithes growing and arising within the territories of Bondgate, within the parish of St. Michael Appleby, aforesaid; and the lands whereon the corn grew, lie in the territories and parish aforesaid.

It appeared that no tithes had EVER been yielded or paid for or in respect of the said lands.

(a) i. e. For the double value of the tithes.

(b) This seems to be an uncertain and contradictory state of the case; for *Aspinal*, counsel for the plaintiff, *post*. 1275. puts a construction on the words *parcel, &c.* which would reconcile the seeming contradiction in this state of the case; but his construction was not admitted by the court.

It also appeared that ALL the OTHER customary tenants of the said manor PAID *tithe*.

It appeared also, that this was the ONLY customary tenant belonging to the said manor, which was WITHIN the said *parish* of St. Michael.

Whereupon a verdict was found for the plaintiff, subject to the opinion of the court of *King's Bench* upon the following question—

“ Whether the defendant could, in this case, *set up any* PRESCRIPTION which would, by virtue of the stat. of “ 31 H. 8, exempt him from the payment of *tithe*.”

Mr. *Aspinal* (who argued for the plaintiff, on Tuesday 24th November last) made two questions of it, viz.

First, Whether the tenant can set up *any prescription at all*, to exempt him from the payment of *tithe*:

Secondly, Whether the *facts here stated* are a sufficient foundation for an exemption; even supposing that he might set one up.

The second point, he said, might be taken first.

The fact stated, “ that no tithes have ever been paid,” is no exemption, of itself: it is no prescription of exemption. It is *only evidence*: it might have arisen from unity of possession, or other causes.

It will be no foundation for a decree in equity, if it had been *actually found* by a verdict “ that they have never been paid.”

Lord MANSFIELD—The question is “ whether [1275] “ they can, in point of law, prescribe in *non decimando* ;” for, if they can, the non-payment is *good evidence* of it, upon any foot of discharge.

Mr. ASPINALL—By law, he can not. For he must prescribe either in his own name, or in the name of the lord of the manor. But

First, as the defendant is a layman, he can not prescribe in *non decimando*, in his own name.

Secondly, Neither can he prescribe in the name of the lord of the manor. He must prescribe now, as if it still was at the time of the dissolution.

A lord can only prescribe as [to] the lands [in his own possession, and such as] have been holden by his farmers and tenants at will.

These are stated to be *copyhold* † lands parcel of the manor of *Morland*, holden of the lord of the manor; NOT saying “ at the will of the lord.” [† *Leges* customary, see 5 Burr. 2604.]

Therefore, they are CUSTOMARY FREEHOLDS.

Now a lord can not prescribe for his customary FREEHOLDERS; though he may prescribe for his tenants and farmers of copyhold holden at WILL.

1762.

STEPHEN-
SON
V.
HILL.

1764.

STEPHEN

SON

V.

MREL.

[See 2 Vern.
679.]

These lands in the north (c) are customary freeholds, and pass by feoffment and livery (d) and are not *holden ad voluntatem domini*. Therefore they are not like copyholds: as appears by *Carthew*, 432. *Gale v. Noble*—(Trial at bar in ejectment for lands parcel of the manor of *Corham in Wills.*)

The expression "*parcel of the manor*" only imports "that they lie *within* the manor."

The court will favour the better estate. Therefore, taking it to be a *customary freehold*, the lord could not prescribe in *non decimando*, in *ANY manner* whatsoever.

He can not prescribe as by the *custom of the manor*: for the custom of the manor, in general, is stated to be quite contrary.

[1276]

* V. 2 Danv.
Abr. 610.
P. 3, 7.
Yelv 2.
Moore, 618.

The case of the Bishop of *Winchester*, *Crouch v. Friar*, in many books, but most at large in *Cro. Eliz.* 784. * will be urged against me. But supposing that to be law, yet the lord of the manor did not prescribe against himself as appropriate rector. He was founder; and therefore a stipulation might be presumed: whereas here, the dean and chapter have had both the manor and the tithes, in themselves. And that was a prescription for *copyholders*: and the custom was prior to the parochial right of tithes; which first commenced by the council of *Lateran*, in the time of King *John*.

Nor can he be exempted by unity of possession. *Unity of possession* is a distinct thing from *prescription*.

Besides, here he can not rely upon unity of possession; because it has been in other hands from time immemorial.

(c) There may be customary freehold, passing by surrender. *Salk.* 365. 1 *Atk.* 474. *pl.* 17.

In *Fortesc.* 41. it is said that "it was agreed that the custom of tenant right estates, extends only to three northern counties, i. e. *Cumberland*, *Westmoreland*, and *Northumberland*."

And in another case in the same book, page 55, it is said that "those tenant right estates, are no where to be found but in those three counties," where the evidence of this custom in one of those is evidence in any other of the three. Now in the case of *Gale v. Noble* the lands lay in *Wiltshire*, and therefore no argument could be inferred, from the determination in that case, so as to affect the case here reported by *Burr.* because the lands in this case lay in *Westmoreland*.

(d) Vide post. 1276. where it is said they never pass by feoffment but by grant.

Also that there may be customary freehold passing by surrender. See *Salk.* 365. 1 *Atk.* 474. *Br. Cust. pl.* 17.

And copyholders at will cannot be exempted by prescription.

Mr. Clayton, for the defendant—No tithes have been ever paid for these laads, from 31 H. 8. And after this length of time, a legal exemption will be presumed.

This was a great abbey, that came to the crown by the stat. of H. 8. And the manor was in the prior, in right of his priory. These lands were therefore discharged from payment of tithes, at that time: and their discharges from tithes are preserved to the crown and their grantees and assignees, by 31 H. 8. in the same manner and to the same extent as when they were in their hands.

SPIRITUAL persons may prescribe in *non decimando*; and so may their farmers and tenants; and even their copyholder of inheritance. 1 Ro. Abr. 653, pl. 2, 3, 4, 5. * 2 Co. 44. Bishop of Winchester's case. Cro. Eliz. 216, 475, 511, 512, 704, 784. Moore 219. Branch's case. Yelv. 2. Croucher v. Fryar, Noy † 132. Anonymous. And customary estates of inheritance may be discharged in the same way: for the freehold is in the lord.

These customary estates in the north are not freeholds: but copyholds; and in the nature of tenancies at will. They never pass by *froffment*, but by *grant*; and often by *grant and admittance*: but an *alienee* can not maintain an ejectment, till admittance: for the estate does not pass to him, as it does to the *heir by descent*.

Though many other parts of this estate have paid tithe, yet there may be a prescription for a discharge for part: a prescription may be for a single part, alone. But this is the only tenement that lies in this particular parish.

As to the *unity of possession*—Supposing it liable to a doubt, yet you may prescribe, "that the prior held it discharged time immemorially:" *Priddle v. Napper*, 11 Co. 14. And the case of *Wright v. Gerrard and Hildersham*, agrees "that an unity and a perfect discharge may stand together;" and cites 11 Co. 14. as truly saying so. 2 Keb. 459. * *English v. Johns*. That a unity of possession, and a perfect discharge from tithes, may stand together, can not be disputed.

Here, none have ever been paid. Therefore the court will presume a legal discharge.

This is a unity, time out of mind: which is a sufficient discharge, after so long a time.

The prior was seized both of the rectory and of the land. It was not necessary to be in actual possession of the lands. *Hob. 306. Wright v. Gerrard and Hildersham*. 11 Co. 14. *Priddle and Napper's case*. 2 Co. 48. The archbishop of Canterbury's case.

1762.

STEPHEN
SON
V.
HILL.[* Or 9 Vin.
23.]† Crouch v.
Fryar is cited
there.[1777]
[See Cro. Car.
419. as to a
custom.]* This was a
plea of dis-
charge by
reason of the
unity. But it
was adjourn-

1762.
STEPHEN-
SON
v.
HILL.

These *customary tenures* are not *freeholds*: the *timber*, the *mines*, are in the *lord*. Therefore it is the common case of *copyholders*: which has been determined over and over; particularly in *Cro. Eliz.* 784. in the case of *Crouch v. Fryer*.

It is enough, if we are discharged in *any* manner.

Mr. *Aspinall*, in reply—It shall not be *presumed* “that tithes are *not payable*, because they *have not been paid*.”

The case I mentioned is a prescription for the bishop himself, his farmers, and tenants at will.

The *customary estates* are not *copyholds*: the *freehold* is in the *tenant*. 1 *Salk.* 365. *Crouther v. Oldfield*. They pass by the *deed*, † not by the admittance.

† But it seem-
ed agreed,
that in every
manor, there
is either an
admittance,
[1278]
or a licence;
and every
thing is in the
lord, that cus-
tom has not
taken out of
him.

Here was *no unity of possession* in the prior, of the rector and of the lands. *Moore*, 528. *Benson v. Trott*. *Moore* 219. *Branch's case*. *Cro. Eliz.* 704. *Crouch's case*.

Here, the tithes arise, upon leasing out the lands. The *unity ceases*, when the prior ceases to hold *both* lands and rector together.

Either by *prescription* or by *unity*, the lands ought to be charged.

Uterius concilium.

THIS CAUSE now standing in the paper for further argument—Mr. Solicitor General (Sir *Fletcher Norton*), who was for the plaintiff, said that the particular customs of the manor (which had been inquired after, in the course of the former argument) were not yet sent up.

LORD MANSFIELD—What signify the customs? clearly, the *freehold* is in the LORD. (e)

Sir *Fletcher Norton* acknowledged that he had a great difficulty to get over; it being stated in the case itself, “that this was the *only* customary tenant, belonging to the manor, which was within this parish.”

LORD MANSFIELD and Mr. Justice DENISON said it was a settled point, “that the *freehold* is in the LORD.” And Lord *Mansfield* added, that this is rather *stronger*

(e) It is stated, in page 1273, that the land in question was parcel of the manor, which could not be, if the freehold was in the tenant; for freehold estates, holden of a manor, are not parcel of the manor, but the rents and services by which they are holden are parcel of the manor, 2 *Rol. Abr.* 120. (C.) or 15 *Fin.* 218. (C.) 1. 11 *Mod.* 53. *Salk.* 365. 2 *Ld. Raym.* 1225. and according to the opinion of the court of B. R. as reported in *Salk.* 364. the land in this case must have been copyhold. See also *Ld. Raym.* 1231. S. C. and S. P. Per *Holt*. Ch. J.

than the case of copyholds. (f) For, copyholders had acquired a permanent estate in their lands, before these persons had done so. 1762. STEPHENSON

*Per * Cur'*—Let the *postea* be delivered to the defendant, in order for a JUDGMENT of NONSUIT.

FENTON *versus* EMBLERS, Executor of MAY.

THIS was a special case, reserved at *nisi prius* at the assizes at Abingdon.

It was an action upon the case upon *assumpsit*, against Emblers, as representative of one May deceased.

The declaration contained six counts: and upon the first four counts, there was a verdict for the plaintiff; and for the defendant, on the sixth. The only doubt was upon the fifth count: which fifth count was "that the said William May, in consideration that the said Sarah (the plaintiff) would be and become the house-keeper and servant of the said William, and take upon herself the care and management of his family, &c. and perform the same as long as it shall please the said William and Sarah; undertook and promised to pay wages to the said Sarah at and after the rate of six pounds for one year; and ALSO BY HIS LAST WILL AND TESTAMENT [Str. 728.] to give and bequeath to the said Sarah a legacy or annuity of 16l. by the year, to be paid and payable to her yearly and every year from the day of the decease of the said William for and during the term of her natural life; and that she the said Sarah, confiding in the said promise, entered into his service, and became his house-keeper, &c. and continued so for three years and fifty-nine days: but that he the said William had not performed his said agreement, and did not leave her such legacy or annuity, &c." [1279] [Swinb. 262.]

It was stated in the case, that it appeared upon the evidence, that there was such an agreement between the

(f) This must be a mistake; if it was stated in the case, as mentioned by Mr. *Aspinall*, ante 1275, that the lands were copyhold parcel of the manor, holden of the lord, without saying at the will of the lord; for the omission of those words cannot make the case stronger than the case of copyholds, but the contrary: for certainly the words at the will of the lord are strong proof that the freehold is in the lord. *Vid.* 12 *Car.* 2. c. 24. s. 17. And *qu.* if the tenure be not copyhold, how can it be any other than tenure in socage? and the freehold is not in the lord in case of a tenure by socage, *Vid.* 1 *P. Wms.* 408,

HILL.
* Mr. Justice Foster was not present.

[S.C. 1 Black. 553.]

Agreement to leave money by will need not be in writing. 10 East 139. A. 722.

1762. said *William May* and the plaintiff; but that it was by
 FENTON PAROL, and NOT in writing.
 v. That the plaintiff in performance of her part of the
 EMBLERS. said agreement, did enter into the testator's service,
 as housekeeper, &c. and continued in such service till the
 testator's decease.

That the testator *did not* give her by last will, or
 otherwise, the said annuity of 16l. *per annum*, or any
 other annuity.

A verdict was found for the plaintiff on the fifth count, for
 22Cl. subject to the opinion of the court; first, whether
 the *evidence was sufficient* to maintain the action upon it:
 secondly, whether the agreement therein set forth ought
 not to have been in *writing*. (c)

Mr. *Hall*, for the defendant, objected—First, that this
evidence is not sufficient to prove the special agreement
 laid in the fifth count: which ought to be proved pre-
 cisely. He said, there was a material variance between
 the case *laid* in the declaration, and the case *proved*.
 For, the case laid in this fifth count in the declaration, is
not a hiring for a year; because either party was at liberty
 to put an end to the contract: but the case proved is a
general hiring; which, in construction of law, is a hiring
 for a year.

[1280] Secondly, that by the statute of frauds, (29 C. 2. c. 3,
 § 4.) this agreement, as it was to be performed *within*
a year, ought to have been reduced into WRITING. The
 statute says "no action shall be brought, whereby to
 "charge any executor or administrator, upon any agree-
 "ment that is *not* to be performed *WITHIN the space of*
 "one year from the making thereof; unless the agree-
 "ment upon which such action shall be brought, or some
 "memorandum or note thereof, shall be in WRITING,
 "and signed by the party to be charged therewith,

(c) It appears by *Blackstone's* report that there were
 two questions reserved for the opinion of the court, the
 last of which is here omitted: the two questions were
 these; FIRST, whether the agreement should not have
 been in writing under the statute of frauds. SECONDLY,
 whether evidence for hiring for a year (as was the
 fact) was proof of hiring for so long as both parties
 pleased, as laid in the declaration; and it appears by the
 arguments at the bar and the opinion of Lord *Mansfield*
 at the end, that there was such second question; but
 the hiring as mentioned by *Stowe*, was a general hiring,
 which being in legal construction a hiring for a year,
 might be the reason for *Blackstone* stating it to be so.

"or some other person thereunto by him lawfully authorized."

This is a promise of a legacy, by an instrument revocable at pleasure. It would be extremely inconvenient to establish promises of this kind, not reduced into writing. The present agreement could not be performed, on *May's* part, *within a year*: for a whole year from his death was to elapse, before the annuity or any part of it would become payable.

He cited 1 *Ld. Raym.* 316. *Smith v. Westall*; and relied on a case of *Reynolds v. Spencer Comper*, in *Scacc.* in 1726. *Viner. Tit. Contract and Agreement*, p. 524. § 47. (which case he said he had ordered to be searched, and found it to be so;) where the rule laid down is—

"That a *parol* promise, to be performed upon a *contingency* which may or may not happen within a *year* after the making, is *void*, within the statute of *frauds*."

Mr. *Stowe*, *contra*, for the plaintiff, insisted first, that the evidence *does* support the declaration; and that the fact is *precisely proved*.

Secondly, that it was *not* necessary that this agreement should be reduced into *writing*. The action is brought for *May's* not having done what he ought to have done *in his life-time*: so that it might and should have been *done within* the year. This consideration is sufficient, at *common law*, to raise a promise. The statute of *frauds* does not affect this case. Mr. *Hall's* doctrine would overturn all the cases upon verbal general contracts of matrimony, where the defendant did not *actually* promise "to marry within the year."

He cited two cases in point; *viz.* 1 *Salk.* 280. *Anonymous*. P. 5 *W. & M. C. B.* and the case of the promise to pay 20*l.* on marriage, mentioned in 1 *Ld. Raym.* 316, 317. *Smith v. Westall*.

Mr. *Hall*, in his reply,—observed that this is a method of *binding the assets, without making a will*.

Lord MANSFIELD—There is only that case in the *Exchequer*, in 1726, that can make the least doubt. By the other cases it seems settled. [1281]

There is nothing in the objection about his leaving it *by his will*: for there is nothing *testamentary* in a promise "to leave at his death."

The case in 1726, in the *Exchequer*, cannot be rightly represented to us: for, as it is represented, one of the two resolutions, *viz.* that upon the statute of limitations, is *wrong* to the last degree, and obviously so to every body. It is represented to have been there resolved "that that statute bars eventual rights, from the time of the *promise made*, (after the six years are elapsed:)" whereas

1762.

FENTON
v.

EMBLERS.

[1 Hen. Bl.
635.]

1762.

FENTON
v.

EMBLERS.

no one can doubt but that the bar only takes place from the time when the *right accrued*, and *not* from the time of *making the promise*.

Mr. Justice DENISON—The statute of frauds plainly means an agreement *NOT* to be performed within the space of a year, and *expressly* and *specifically* so agreed. *A CONTINGENCY* is *not* within it; nor any case that *depends upon contingency*. It does *not* extend to cases where the thing *only* *MAY* be performed within the year; and the act cannot be extended further than the words of it.

* This case had been mentioned by Mr. Justice Wilmot; and it seems to me to be the very case cited by Mr. Northey, and discussed by Ld. Ch. J. Holt, in the case of Smith v. Westall, 1 Ld. Raym. 316, 317.

Skinner, 353. * *Peter v. Compton*, proves the distinction of a contingency, as I have stated it, as fully and clearly as possible. It was an action upon the case upon an agreement, in which the defendant promised, for one guinea, "to give the plaintiff so many at the day of his marriage." The question was, "if such agreement ought to be in writing;" for the marriage *did not happen within a year*. The Chief Justice (HOLT, before whom it was tried,) advised with all the judges, and by the greater opinion (for there was diversity of opinion, and his own was *à contra*) " (where the agreement is to be performed upon a contingent, and it *does not appear within the agreement*, that it is to be performed AFTER the year, there a note in writing is *not* necessary: for the contingent *MIGHT* happen within the year; but where it *appears* by the whole tenor of the agreement, that it is to be performed *after* the year, there a note is *necessary*; otherwise, *no*."

† Mr. J. Foster was absent.

† Mr. Justice WILMOT concurred; and agreed with the reason of the case in *Salk*. 280. "That by possibility, the ship *might* have returned within the year; though by accident it happened that it did not: and the clause in the statute only extends to *such* promises, where, by the *express* appointment of the party, the thing is *NOT* to be performed within a year."

[1282]

Lord MANSFIELD—As to the *variance*, there is nothing in that objection.

Let the *postea* be delivered to the plaintiff.

APPLETON versus SMITH,

No more costs than damages in trespass, if the verdict be under 40s.

THE question was, "whether the plaintiff should have *FULL costs*, or *no more costs than damages*:" upon the following case.

This was an action of *trespass vi et armis*, for *breaking and entering the plaintiff's dwelling-house*, and there making a great noise and affray and disturbance; and continuing it for two hours, and UNTIL the plaintiff and his father Richard Appleton the elder, and one Christopher Atkins were compelled and obliged to give and did give the defend-

put their promissory note for 6l. 17s. payable to him the said defendant. The jury found for the plaintiff, and gave him a guinea damages. 1762. APPLETON

Mr. Serjeant Nares insisted, on behalf of the defendant, that the plaintiff could, in this case, have no more costs than damages. V, SMITH,

For that, by the statute of 22 & 23 Car. 2. c. 9. § ult. "In all actions of trespass, assault, and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not certify upon the back of the record that an assault and battery was sufficiently proved, or that the freehold or title was chiefly in question; and the damages found are under 40s. the plaintiff shall recover no more costs than damages."

This is a general action of trespass; and there is no certificate from the judge.

The circumstance of "continuing the noise and disturbance until these three persons gave their note for 6l. 17s. is only aggravation."

There are two cases in point: viz. *Blunt v. Mither*, in [1283] C. B. 1 Sir J. S. 645. (called *Blunt v. Miller* in *Gilbert's Cases in Scacc.* 197.) and *Boiture v. Woolrick*, in 1 Ld. Raym. 565.

The case of *Swinstead v. Lyddall*, 1 Salk. 408. is also a case similar to the present. It was an action of trespass and false imprisonment for such a time, and *quousque* he paid 11s. It was holden "that the *quousque* was not the cause of action: but the imprisonment: the *quousque* was only matter of aggravation."

And there was a late case of * *Howard v. Parr*, from * Or Ford v. Staffordshire, which was an action by a school-master, Parr. for disturbing him in the possession of his house, and continuing such disturbance, &c. the verdict was for less than 40s. And there was no certificate; and the plaintiff could have no more costs than damages.

Mr. Serjeant Davy argued *contra*, for the plaintiff.

The question in this case is, "whether the FREEHOLD *could come in question*:" for if it could not, then the judge could not certify. And the settled construction is, "that this statute is restrained to those cases in which the judge can certify."

Where the damage is *consequential*, under a "*per quod*," it is indeed only *aggravation*. The cases cited against me are, all of them, such cases of aggravation by reason of *consequential* damages.

Where there is an *asportavit*, the title can never come + It was so in question: nor in actions of mere assault and battery. settled in the For this statute of 22, 23 C. 2. c. 9. § ult. doth not extend to all trespasses, but only to such trespasses *quare* case of Smith v. Clarke, P. 13 G 2. B. R.

1762.
APPLETON
v.
SMITH.

clausum fregit, in which the freehold of the land may probably come in question. And so it is determined expressly, in 3 Mod. 39. *Barnes v. Edgard*; and in *Smith v. Batterton*, there cited, (and reported in *Raym.* 487. and Sir *T. Jones* 232.) and in *Thomson v. Berry*, in *C. B.* reported in 1 Sir *J. S.* 551. All the cases apply to this general rule.

Lord MANSFIELD—THIS case depends upon the words, “and UNTIL the plaintiff, &c. were compelled, “&c.” which words are barely an *aggravation* of the defendant's continuing in the house; and nothing more.

[1284] On the first words, (*viz.* “breaking and entering the “house,”) the freehold might have come in question.

Mr. Justice DENISON concurred, “that they are only “words of *aggravation*; which need not even be answered “in a plea.”

*Mr. Justice
Foster was
absent

THE * COURT directed the master to tax the costs at
A GUINEA ONLY.

See this subject relating to the recovery of full costs, or the not obtaining any more costs than damages, very clearly explained by Lord Chief Baron Gilbert, in delivering the opinion of the court of *Exchequer*, in the case of *Reeves v. Butler*, *H. 12 G. 1.* Where he compares and interprets the several statutes upon which cases of this kind depend; and indicates the reasoning and resolutions of the judges upon 22, 23 *C. 2. c. 9. § ult.* Amongst the modern resolutions which he mentions, he reports the case of *Blunt v. Miller* (as he calls the defendant) in the very same words with Sir *John Strange*; excepting a gross mis-print of “*decreed*,” instead of “*denied*,” and a year's antedate of the time, (*M. 11 G. 1.*) *Gilbert's Equity Cases*, 195 to 200.

INGLE versus WORDSWORTH, et al'.

In Replevin.

Thurs. 28th
Jan. 1762.

[S. C. 1 Bl.
355. Say. L.C.
182.

One of two
defendants in
replevin can-
not have his
costs of ac-
quittal.

ONE of the defendants having been acquitted by verdict (on a plea of “*non cepit*,”) and there being no certificate of the judge “that there was a reasonable “cause for making him a defendant;” Mr. Norton moved, on his behalf, upon *Saturday 23d May 1761*, that the plaintiff in replevin might shew cause why the master should not tax the defendant's costs (pursuant to 8, 9 *W. 3. c. 11.* “for the better preventing frivolous and “vexatious suits,”) as if a verdict had been given against the plaintiff, and all the defendants acquitted. All the other defendants had avowed; and issue was taken upon

a right of common, which was found for the plaintiff in replevin, viz. "that he had right of common."

The master had a doubt whether the action of REPLEVIN was within the statute of 8, 9 W. 3. c. 11. § 1. which specifically names only actions of trespass, assault, false imprisonment, and *ejectione firmae*.

On Wednesday 10 June 1761, Mr. Clayton shewed cause; and insisted, on behalf of the plaintiff in replevin, "that this defendant was not intitled to any costs."

REPLEVIN is not within the act of 8, 9 W. 3. c. 11. And it is clear, that before that act, a plaintiff should not pay costs to a defendant who was acquitted; provided he succeeded against any one of the defendants in the action.

There are no direct instances indeed in REPLEVIN, determined since the statute: but there are in similar cases; as *trover*, and *nuisance*. And the act ought to be construed strictly, being a *penal law*.

The case of *Marriner v. Barret* (or *Barwick*) P. 1 G. 2. was in *trover*. It was there holden that a defendant who was acquitted was not intitled to his costs; because not within the words of the act: and costs were there considered as a *penalty*.

In the case of *Dibben v. Cook et al'* M. 8 G. 2. B. R. for a *nuisance*, it was holden that the act only extended to trespasses *vi et armis*.

In 1 Salk. 194. *D'na Regina v. Danoers et al.* On an information, one defendant, being acquitted; prayed costs, on the equity of this act; but was denied.

Mr. Norton, *contra*, in support of his rule, contended that the acquitted defendant was intitled to his costs. The act of 8, 9 W. 3. c. 11. is a remedial law; and no otherwise penal than as it gives costs: and so the title speaks it; "an act for the better preventing frivolous and vexatious suits." And this is certainly frivolous and vexatious, in the opinion of both judge and jury: for, the one is not certified "that there was a reasonable cause to make him a defendant;" the other has acquitted him.

A replevin is within both the letter and the spirit of this law. It is properly within the word "TRESPASS:" and the act uses the word "plaint," with a particular view to this species of trespass. And it is within the spirit of the statute certainly; because, otherwise, the plaintiff in replevin might add twenty or thirty defendants, for the sake of harassing and vexing them frivolously.

He acknowledged the case of *Dibben v. Cooke* to have been as stated, except as to this law being treated as a penal law; which Lord Hardwicke (as Mr. Justice DENI-

1762.

INGLE

V.

WORDS-

WORTH.

[See 2 H. Bl.

28.]

1285]

1286]

[3 Durn. 156.]

1762.

INGLE

V.

WORDS-

WORTH.

to determine
upon citing the case of *Coan v Bowles*, for the rule there laid down "that statutes concerning costs are to be construed strictly;" and he adopted the principle the court went upon; though he could not come into the reason they there gave for it.

son confirmed) then * declared, it was *not*: but he said it was determined upon *too narrow* principles.

* Lord Hardwicke's expression appears by my own notes to have been as follows—"And though in my own mind I am not satisfied that costs are in the nature of a penalty; (for they seem to me rather in the nature of a satisfaction; yet I think we are not authorized contrary to the course of all these former resolutions." He said this upon citing the case of *Coan v Bowles*, for the rule there laid down "that statutes concerning costs are to be construed strictly;" and he adopted the principle the court went upon; though he could not come into the reason they there gave for it.

However, that was *not* an action of REPLEVIN: and there is no determination of this sort, in a case of REPLEVIN; which seems to be within the very word "*plaint*."

Mr. Clayton said he had forgot to mention a very material case, in which it was determined that the avowant in replevin *can not* have his costs, upon error brought by the plaintiff in replevin and *judgment affirmed*. It is in *Carthew* 179. *Coan v. Bowles*. The ground of the resolution is, "that he is *not within the LETTER* of the acts; " and the principle there laid down was that these acts "are to be taken *strictly*, and *NOT extended beyond the letter*, because costs are in the nature of a PENALTY."

Lord MANSFIELD—If no reason had been given, the authority might have had more weight: but, to be sure, the reason is a FALSE one.

THE COURT took time to consider of it—

And now Lord MANSFIELD delivered their opinion.

We have thought of this case. We had a strong bias to have given the defendant his costs, if it had been possible; because it is agreeable to *natural justice*, that he should receive them, if there was no reasonable cause for making him a defendant.

But the matter is *too fully settled* to be now gone into, upon reasons at large.

The statute speaks *generally* of actions of TRESPASS; and does not particularly *specify* any actions of trespass that are not trespasses *quare vi et armis*. But this is a case of REPLEVIN; which cannot have that latitude of construction put upon it, which Mr. Norton has contended for, consistent with the *settled* cases.

[1287] It has been so settled and established, "that *this act* " and all acts that give costs, are to be construed " *STRICTLY*."

* V. 2 Sir J. S.

1005, 1006.

[3 Barnes.

118. acc.

Contra,

Cooke's Rep.

107.]

The case of * *Dibben v. Cooke* is not so fully reported in *Sir John Strange*, as it really passed. Lord *Hardwicke* gave the solemn judgment of the court: and declared it to be then *settled* "that all the statutes relating to costs " are and ought to be construed *strictly* and according to " the letter." And he declared, "that actions of tres-

1762.

BONE

v.

ASHTON.

" in the court of *King's Bench*, &c." had been paid to the mortgagees, and the prison rebuilt, in pursuance of the act.

That 200l. a year, part of the profits of the office of marshal of the *King's Bench* prison, arise from letting rooms in the said prison.

That the marshal has, as belonging his office, a house to live in; with a garden and a piece of land belonging thereunto, and two houses for his officers to live in; rebuilt also according to the directions of the said act of parliament.

That in the year 1759, he was assessed to the land-tax in the county of *Surry*, as follows, viz. " for the prison of the *King's Bench*, house, lands, garden, and common side 300l.; for his office and perquisites, as marshal 200l."; in all 500l.: which assessment was, on an appeal, reduced to 300l. viz. " for the prison of the *King's Bench* prison-house, land, garden, and common side, 250l.; for the office and perquisites as marshal 50l."

That the defendant insisted on no other qualification, save what arose to him as aforesaid.

THE QUESTION submitted to the court, was—" Whether the defendant is liable to the penalty demanded in the first count in the declaration."

Mr. *Coxe*, for the plaintiff, endeavoured to shew that the marshal had no qualification, either from the prison, house, land, garden, and common side, or from his office and perquisites as marshal, to act as a commissioner of the land-tax. For, the qualification required by the land-tax act must arise out of LANDS and TENEMENTS, not out of offices or perquisites. The words of the act are plainly confined to lands and tenements: the expressions of " leasehold, copyhold, ground-rents, &c." are not applicable to OFFICES or PERQUISITES.

And the freehold of the prison, house, lands, garden, and common side, is in the CROWN: they are the crown's property. The marshal has NO FREE-HOLD in the prison, house, lands, garden, &c. though he has indeed a qualified freehold in his OFFICE.

To prove " that the freehold of the prison, house, lands, garden, &c. is in the crown," he relied upon the statute of 27 G. 2. c. 17. which recites that of 8, 9 W. 3. c. 27. and (by its second clause) RE-VESTS the prison and the site thereof, and the ground and appurtenances thereunto belonging, and the power of granting the custody of the said prison and the office of marshal, in the CROWN, for ever, unalienably. And he has only a qualified freehold even in his OFFICE.

The same act (§ 5.) appoints the defendant Mr. *Ashton*,

marshal (a) so long as he shall behave himself well in his said office: and (§ 8.) makes him *removable* by rule or order of this court, for misbehaviour or neglect of duty. And he stands only taxed at 50l. for the OFFICE, exclusive of the prison, house, lands, garden, and common side.

1762.

SONS

V.

ASHTON.

Mr. Lee, *contra*, for the defendant, said the case itself was so plain, that no argument could make it plainer. That the words " lease-holds, copy-holds, ground-rents, &c." are to be applied to the subject matters of them *respectively*, though not jointly. That the OFFICE is granted to the defendant; and the prison, house, lands, garden, and common side, are *annexed* and *incidental* and naturally and necessarily *belonging* to it, and *pass with* it as being so *incidental* to the office. That OFFICES are [Comyns 270.] qualifications within this act; and that it is admitted " that the defendant has a *qualified free-hold* in this office ; which is * sufficient.

* V. 4 Inst.

117. c. 12.

(relating to

the chief

baron's of-

fice.)

[Law of El.

ed 1774.

p. 34, 35, 36.]

[1290]

Mr. Core replied, that his free-hold is *confined* to the OFFICE: he has no free-hold in the *prison*, &c. or in any *lands or tenements*.

Lord MANSFIELD—Is not his office a TENEMENT? and he has a qualified freehold in it. He is qualified, both within the *words*, and within the *intention* of the statute. Is not the master of the Rolls qualified for the houses which belong to him in the right of his office? I know, that the master of St. Catharine's has sat in parliament, under the qualification of his office.

Per Cur'. (Mr. Justice Foster absent,)

Let the *postea* be delivered to the defendant.

FAIR-CLAIM, ex dismiss' FOWLER et al. *versus* SHAM—Thursday, 4th TITLE. Feb. 1762.

In Ejement.

[S. C. 1 Black.

357.]

UPON Monday 23d of November 1761, Mr. Ashurst, Lord by es- supported by Mr. Serjeant Nares, Mr. Norton, and cheat claiming Mr. Morton, moved (on behalf of the plaintiff,) to be admitted to *dis-* defendant in charge a rule whereby it was ordered that Granville, Earl of Gower and Thomas Gifford, esq. *lund*lords of the tenant in possession of the premises in question, should be *joined* and *made defendants with the said tenant*, if he shall appear: and the said earl and Thomas desiring that if the said tenant shall not appear, that they may *appear for themselves*; and consenting that, in such case, they will enter into the common rule " to confess lease, entry, and

(a) As to the appointment to this office pursuant to 27 Geo. 2. c. 17. vide 4 Burr. 2183, 4.

1762.
FAIR-
CLAIM
ex dimiss.
FOWLER
v.
SHAM-
TITLE.

" ouster, in such manner as the said tenant ought in
" case he had appeared;" leave is given to the said earl
and *Thomas*, pursuant to the late act of parliament, if the
said tenant shall *not* appear, to *appear by themselves*; and,
upon their entering into such common rule, to *become*
defendants in the stead of the casual ejector, and to *defend*
their title to the said premises, *without* the said tenant.
The plaintiff, nevertheless, is at liberty to sign judgment
against the casual ejector: but execution thereon is stayed,
until the court shall further order.

N. B. There
was a likerule,

whereby Sir Hugh Briggs and Lord Bradford (lords of other manors, who
also claimed by escheat,) were admitted defendants exactly in the same manner
as Lord Gower and Mr. Gifford were by this rule.

Their objection to the rule was " that Earl Gower and
" Mr. Gifford had *never been in possession*:" (of which fact
they had affidavit.) (a)

This rule must therefore, as they said, have been ob-
tained by *surprise*: for that the act of parliament of 11 G. 2.
c. 19. § 13. was made for the security of landlords who
had been in possession, and whose tenants neglected to give
them notice of ejectments.

[1291]

* The case
was Doe on
the demise of
James Goore
v. Roe. On
the last day of
Hilary term,
1761, upon
the affidavit of
William Sca-

And they cited a *case, a few terms ago, where such a
rule as this was made, " to shew cause," only: and on
this *same cause being shewn*, (viz. " That neither party
" *had been in possession*,") the said rule was *discharged*. So
HERE, the earl and Mr. Gifford claim by ESCHÉAT, on the
death of *Elizabeth Levison*; and the plaintiffs claim as *heirs*
at law to her: but *neither* have been in possession.

William Sca-
risbrick, the conditional rule was obtained on Mr. Yates's motion, " to make the
" said William Scarisbrick (who claimed the premises, as purchaser under the heir at
" law of Thomas Goore, who died seised in fee.) a defendant with the tenant, if he
" appeared; or without him if he refused."

Upon the first of May, in Easter term following, Mr. Clayton obtained a rule,
to shew cause why the above rule, " for making the said William Scarisbrick de-
" fendant," should not be discharged with costs.

Upon the sixth of June in the subsequent Trinity term, cause was shewn: and
upon hearing counsel for both parties, the said rule was discharged, but with-
out costs.

James Goore claimed to be the true heir at law of Thomas Goore: but the pos-
session had been in leasees under a lease granted for ninety-nine years, by
Thomas: which lease was recently expired.

All the tenants but one have attorned to the lessors of
the plaintiff: and that one tenant did not appear.

(a) See 3 Durn. 783. Just. Inst. Lib. 4. Tit. 15. Text 4.
4 Durn. 122. And note that in 3 Durn. 783. counsel relied
on this case; but Lord Kenyon answered that it appeared
to have been by consent.

They cited as a case in point to prove "that the court have no jurisdiction to admit any person to defend an ejectment instead of the tenant, except one who is in some degree of possession"—2 *Barnes*, p. 28. of appendix, *M. 29 G. 2. C. B. Roe, ex dimiss. Leake and others, v. Doe.*

1762.
FAIR-
CLAIM
EX DIMISS.
FOWLER
V.
SHAM-
TITLE.

THE COURT gave them a RULE to *show cause.*

Upon Friday, 27th of November 1761, Mr. Harcey, Mr. Thurlow, Mr. Aspinall, Mr. Madocks, and Mr. Stowe (on behalf of Earl Gower and Mr. Gifford) shewed cause why the above recited *original* rule should not be discharged: and they argued thus.

The lessors of the plaintiff claim as *heirs*: we claim by *escheat* of a copyhold, *pro defectu hæredis*: not for a forfeiture for want of an heir's coming-in. If there be an heir, we claim nothing: We therefore only desire to have the cause tried.

A lord of a manor has such a *seisin* at law, of an *escheated copyhold*, that the occupier is *his tenant at will*, and the lord may *distrain* for the rent: and though perhaps the occupier may not be liable to the penalty of the triple rent, yet the lord may *avow* upon him for the *single* rent. [1292]

The lords by *escheat* claim upon the same foot as if they were *heirs* to the deceased tenant: and the heir might be admitted to be made defendant: though he had *never received rent*. The estate originally belonged to the lords, and moved from them, and reverts to them for want of heirs of the tenant: and we are *neither strangers, nor collude* with the tenant.

The statute of 11 G. 2. c. 19. § 11, 12, 13. is to be extended further than to those cases only where the rent has been *actually received*: it extends to landlords *de jure*, as well as to landlords *de facto*. A PROBABLE CAUSE of claim is sufficient to intitle the landlord to be made defendant: his *real* title is to be tried hereafter, in the cause.

BEFORE the statute, the landlord had a right, *by law*, to be joined with the tenant: and the statute inforces this right. And it must be construed liberally, to prevent the mischief which occasioned the making of it.

But the plaintiffs come too late, in this application. They have *estopped* themselves, by proceeding after our rule: they have proceeded even so far as to the nomination of a special jury; and then they gave notice "that they should not try the cause." So that they have acknowledged us as tenants.

The case of *Goore v. Roe* or *Scarisbrick*, was a case where no rent had been paid by any body: and *Scarisbrick* had purchased a pretended title. But the lord of this manor is *dominus terra*, and within the words of the act.

As to the case in *Barnes*—

1762.
FAIR-
CLAIM
ex dimiss.
FOWLER
v.
SHAM-
TITLE.

[1293]

Lord MANSFIELD—I do not understand that note. It puts the refusal of the motion, upon want of jurisdiction, and a case cited by Serjeant *Davy*. Whereas, in *ejectments*, the court can never want jurisdiction to prevent the plaintiff from recovering without a proper trial. An *ejectment* is the creature of *Westminster-hall*, introduced within time of memory; and moulded gradually into a course of practice, by rules of the courts. The same authority which brought it *thus far*, may certainly carry it to a higher degree of perfection, as experience happens to shew inconveniences or defects. The act of 11 G. 2. was drawn and brought in by Sir *John Strange*; the provisions therein, relative to proceedings in *ejectment*, were either to enforce a right practice, or occasioned by some case contrary to the general sense of the bar, which the legislature virtually condemns as erroneous. And as to the precedent cited from *Strange* 1241. it is a total mistake: there is not a syllable in that case about a mortgagee being refused to be admitted to defend as landlord.

The counsel for the plaintiff (who had moved to discharge the present rule) argued that these *potential landlords* can not be within the stat. 11 G. 2. c. 19. For “*such*” landlord must be a landlord to whom the tenant is *obliged to deliver the declaration*.

The act, they said, was made to *defend an actual possession*; only; not to *give* one. *Before* the act, no man could have come and been admitted to defend *with* or *instead of* the tenant; nor have put himself in possession: and the act only lets in the landlord, to prevent the tenant from giving up the possession.

The solid construction of this act is “that there being no possession, he could be no landlord.” And the case of * *Goore v. Scarisbrick*, went upon this principle; and was fully argued and discussed. It was moved upon affidavit of *Scarisbrick's* claim; which was a purchase from the heir at law of the reversioner; another person claimed to be heir at law. The rule was discharged. No rent had ever been paid under the lease, in that case: and the court observed “that the tenant would *not* have been liable “to the penalty for not delivering the declaration to “him.”

There is no privity between the lord by escheat, and the tenant.

There must have been *rent actually received*; (except in cases of mortgages after forfeiture, or such like: but even an heir, who has *never received rent*, can not be let in to be made defendant, under this act.

As to any proceedings subsequent to their rule—

The attorney for the plaintiffs might not know of this rule; for, it was obtained only upon the last day of the

* Vide ante
p. 1291, in
margin.

term : and we could not apply sooner, to get it discharged. Besides, he only attended the *naming* of the forty-eight of the special jury. No issue was joined : they never were accepted as tenants.

Moreover, we claim as *HEIR* : and a lord claiming by escheat is intitled to no favour, where another claims as *heir*.

Lord MANSFIELD—It is a point of great consequence: and I am glad that it will be settled.

AN EJECTMENT is an ingenious *fiction*, for the trial of titles to the possession of land.

In *form*, it is a trick between two, to dispossess a third by a sham suit and judgment:

The artifice would be criminal, unless the *court* converted it into a *fair* trial with the *proper* party.

The control the court have over the judgment against the casual ejector enables them to put any *terms* upon the plaintiff, which are *just*. He was soon ordered to give notice to the *tenant in possession*. When the tenant in possession *asked* to be admitted defendant, the court was enabled to add *CONDITIONS*; and therefore obliged him to *allow* the fiction, and go to trial upon the *real merits*.

It might happen, that the tenant in possession was a mere farmer at will. He was bound to give notice to his *landlord*.

The *same reason*, of a fair trial with the proper party, required the landlord to be admitted defendant ; *with* the tenant, if he was amicable; or *without* him, if he, contrary to the duty of his relation, should betray the cause.

There can be no ground for admitting the landlord to be a *co-defendant*, which does not hold to his defending *alone* in case the other abandons.

The plaintiff ought not to recover by collusion with one, to the *prejudice* of a *third*: he ought not to recover, without a *trial* with the *person* interested in the question and affected by the judgment.

Every point relative to the proceeding in ejectments is of *consequence*. I am glad we have this *occasion*.

There are two matters to be considered ;—

First, whether the term "*landlord*" ought not, as to *this* purpose, to extend to *every* person whose title is connected to and consistent with the possession of the occupier, and divested or disturbed by any claim adverse to such possession ; as in the case of remainders or reversions expectant upon particular estates : secondly, whether it does not extend, as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*; so as to prevent *either* from recovering by collusion with the occupier, without a *fair trial* with the *other*.

Where a person claims in *opposition* to the title of the tenant in possession, he can in *no* light be considered as

1762.

FAIR-
CLAIM
ex dismiss.
FOWLER
v.
SHAM-
TITLE.

[1294]

[1295]

1762.
FAIR-
CLAIM
ex dimiss.
FOWLER.
v.
SHAM-
TITLE.

landlord; and it would be unjust to the tenant, to make him a co-defendant: their defences might *clash*. Whereas, when there is *privity* between them, the defence must be upon the *same bottom*; and letting-in the person behind, can only operate to prevent treachery and collusion.

It is no answer, "that any person affected by the judgment may bring a *new* ejectment:" because there is a great difference between being *plaintiff*, or *defendant*, in ejectment.

THE COURT did not, however, give any opinion *then*; but took time to consider of it, till the second day of the present *Hilary* term 1762; and ordered that *notice* should be given to the *tenant in possession*.

On the said second day of *Hilary* term 1762, the tenant in possession, having been served with notice as above, did not appear by any counsel.

Mr. Justice DENISON proposed to search what was the practice in the court of *Common Pleas*, since the act.

LORD MANSFIELD—In the case in this court, which was cited, the tenant in possession opposed both. In that in *C. B.* the tenant in possession had no sort of right.

HIS LORDSHIP proposed to have the fundamental principles considered; and old cases *prior* to the act of parliament looked into; and declared that he had it at heart, "to have the practice upon ejectments clearly settled, upon large and *liberal* grounds for advancement of the remedy."

The great ADVANTAGE of this fictitious mode is, that being under the * *control of the court*, it may be so modelled as to answer in the best manner every end of justice and convenience.

PUBLIC UTILITY has adopted it in lieu of almost all *real* actions: which were embarrassed and entangled with a thousand niceties. But, as there was good and bad in the method of real actions, the *good* ought to be *grafted* into ejectments, in such manner as to *avoid* the *bad*.

He added, it is worth considering, *upon what principles* landlords were admitted to be co-defendants, before the act of 11 G. 2. And desired that every body, that knew of any old cases prior to the act, would inform the court of them. He mentioned a loose note in 12 *Mod.* 211. and the case of *Goudright v. Hart* in 2 Sir J. S. 830.

Mr. Justice DENISON thought it had been considered in *C. B.*

Mr. Justice WILMOT thought the * first part of the act was not introductory of a new law; (for, before the act, a landlord might be made co-defendant;) but that the † second part of it was introductory of a new law.

He proposed to have the point settled, and for that pur-

[2 Burr 668, 669.]

* Vide ante, 668.

[1296]

* Sect. 12.

† Sect. 13.

pose, to have the practice of the court of *Common Pleas* inquired into.

Lord MANSFIELD proposed to have it considered, whether there can be any reason for making a landlord co-defendant, which will not also hold for making a landlord defendant in the *stead* of the tenant; and also to have it considered upon the foot of convenience and expedience; and how it stood *before* the act of 11 G. 2. as well as to argue it *upon* the act; and also, what was the definition of a landlord, as it was understood when they were admitted as co-defendants before the act.

It was then ordered to stand for further argument on *Wednesday, 3d February 1762.*

Mr. *Harvey* then argued on behalf of the lord by *escheat*.

A copyholder could never maintain a *real* action.

But for *lessees*, there were, in the time of real actions being in use, two sorts of this kind of action: *viz.* by writ of *ejectione firmæ, vi et armis*; and by writ of *quare ejecit infra terminum*: in the former of which, there was anciently only a judgment for *damages*, the term not being recovered; in the latter, the judgment was for recovery of the *term*, as well as for *damages*.

But in 14 H. 7. in an *ejectione firmæ, vi et armis*, (the former of the said two sorts of action,) judgment was given in B. R. "to recover the *term*, as well as *damages*:" and it was affirmed upon error." And in another case in 17 H. 8. in C. B. the like was done there. V. F. N. B. 506. H. title *Ejectione Firmæ*.

After which, it became the ordinary method of trying titles to land; and was adopted by *lessors* as well as *lessees*.

But, at first, the lease was *really sealed upon the land* (as a guard against maintenance;) and the action was brought against the *real* tenant in possession.

Afterwards, this mode of proceeding was abused; and *casual ejectors* were set up; by which method, the tenant in possession might be turned out, even without notice. In 1 *Keble* 705. It is said, "that *Keeling* conceived this "way of ejectment was a new device since the late "troubles." But it was a much older practice.

After which inconvenience and others being discovered, notice to the tenant in possession was required. V. *Raym.* 93. *Keys v. Braydon*, (S. C. with 1 *Keble* 705.)

The modern rule was introduced in the time of Lord Chief Justice *ROLLE*.

But from the time of setting up casual ejectors, the admitting landlords to defend, together with the tenant in possession has prevailed. In *Style* 368. H. 1652. It appears that both the courts of *King's Bench* and *Common*

1762.

FAIR-
CLAIM
ex dimiss.
FOWLER
V.
SHAM-
TITLE.

[1297]

1762.
FAIR-
CLAIM
ex dimiss.
FOWLER
v.
SHAM-
TITLE.

Pleas would grant this to a person claiming title to the land. 1 *Siderf.* 24. 12 C. 2. shews that it was *then* usual. *Lilly's Abr.* 497. 23 C. 2. "One who hath title to the land in question may, upon motion to the court, be made defendant with the tenant in possession, that he may thereby defend his title." And this continued to be the method of practice.

The act of 11 G. 2. c. 19. was occasioned by the deficiency of justice, in this method; in *two* respects.

ONE of them was the under-tenant's *not acquainting* his landlord. And the loose note in 12 *Mod.* 211. (Anonymous) is the only case where the doctrine is laid down, "that if notice in ejectment be given to the under-tenant, and he doth not acquaint his landlord therewith, but suffers judgment to go against him, the court (upon motion) will not suffer *execution* to be taken out, till the right be tried." (d)

[1298]

The *other* deficiency of justice was that mentioned in the case in 2 Sir J. S. 830. *Goodright v. Hart et ux* P. 2 G. 2. where the tenant *would not defend*.

* Y. 12.

† Sect. 13.

The former of the two clauses of 11 G. 2. * provides against tenants secreting ejectments from their landlords. The † latter of the two clauses consists of two parts. The first part of it only gives power to do what had usually been done *before*, viz. Admitting the landlord to defend *together with* the tenant in possession. But the second part provides for admitting him to defend *instead* of the tenant, which had been, in some *late* cases, *denied*. See Cases of Practice in C. B. (by Mr. Cooke) 99. P. 7 G. 2. in a case of *Right v. Wrong*, it was *refused*; nor would the court *oblige* the tenant to defend, even upon indemnification. So also in 1 *Barnes* 114. Tr. 6, 7 G. 2. C. B. in the case of *Balderige v. Paterson*—The court denied to make the landlords defendants *without* the tenant in possession, who refused to appear: but they made the common rule, "to *add* them." 1 *Barnes* 120. H. 8 G. 2. C. B. in the case of *Goodright*, ex dimiss. Duke of *Montague v. Wrong*—The court refused to admit the landlord to defend alone, *instead* of the late tenant, who had quitted the possession.

‡ P. 2 G. 2.

These cases gave rise to the act of parliament of 11 G. 2. c. 19. § 13. Part the second. They were all of them *between* the ‡ time of the case of *Goodright v. Hart* (in 2 Sir J. S. 830.) and the making of the said act of 11 G. 2. But *since* that act, it is clear, that at least all persons may

(d) The court will permit a devisee not having been in possession, to defend in ejectment as landlord under 11 G. 2. c. 19. s. 13. 4 *Durn.* 122.

defend without the tenant in possession, who might, before it, have defended with him.

The 12th and 13th clauses of this act are not relative to one another. The 13th is an independent clause: (which point he argued at large.)

It was many years before this act, (even in 5 W. & M. Comberb. 209.) that a rule is laid down by Lord Chief Justice Holt, "that no man is to be admitted tenant or defendant in ejectment by the common rule, unless he hath been in possession or received rents; and not a mere stranger." (c)

But the reason of that rule does not hold in the present case.

A lord by escheat's defending his title can never be considered as *champerty*: (which was one of the reasons. However, this rule is inaccurately laid down in Comberb. 209.)

The adding unnecessary defendants is now prevented by [1799] 8, 9, W. 3. c. 11. (§ 1.) * But before that act, lessors made several defendants in ejectment, in order to take off their evidence: and they could then have no costs, if acquitted. And the rule was made against lessors of plaintiffs, as well as against defendants: and it means to exclude only mere strangers to the possession.

In Comberb. 339. Tr. 7 W. 3. in the case of Jones, lessee of Pride, v. Carwithen;—Lord Bath, the reversioner, was admitted a co-defendant with the tenant.

In Comberb. 332.—A trustee may be admitted, if he desires it; though not without his consent. So, a mortgagee may be admitted. [8 Duru. 645.]

The true rule of admitting as a co-defendant before the act, was "that a mere stranger shall not be admitted: a person NOT A MERE STRANGER has a right to be admitted." He had a right to this. 1 Salk. 257. Tr. 11 W. 3. B. R. in the case of Underhill v. Durham, "a landlord may be joined a defendant with the tenant in possession if he requests it: but the court can not compel him to it."

Now a LORD BY ESCHÉAT is not a mere stranger; but has the immediate right and title, in case no heirship is made out: and therefore he is the most proper person to contest that point of heirship, by whomsoever claimed. And he may very well and reasonably be considered within the word "LANDLORD:" the tenant in possession is his tenant at will, if there be no heir. [See 1 Bl. Rep. 147, 163, 164. 166.] [Qu. Gilb. Ten. ed. 1757. p. 25.]

(c) This seems copied into 1 Lilly's Abr. 498. Ed. 1719; or edition 1745. page 676. And qu. if the practice was not clearly settled agreeable thereto? and so it was holden in a case cited in Bull, 95, 96.

1762.
FAIR-
CLAIM
ex dimiss.
FOWLER
v.
SHAM-
TITLE.

1762.
FAIR-
CLAIM
ex. dimiss.
ROWLER
v.
SHAM-
TITLE.

A lord by escheat is a title *favoured* even in a *freehold*; as appears by Lord *Buckhurst's* case, 1 Co. 2. a. 10 E. 4. 9. b. (f) Much more shall it be favoured in a *copyhold* case, where the freehold is never out of the lord. The tenant in possession is only *tenant at sufferance* to the lord by escheat after the death of the last admitted tenant has been presented. And his not having been in *actual receipt of the rents*, can be no solid objection.

[1300]

There *must* be a *trial of the title*, before possession can be obtained. This is a fixed principle. In *Comberb. 13.* (g) a motion was made for judgment in ejectment, upon a lease sealed on the land; and denied: for *per cur.*—“You must try it.” 12 *Mod.* 211. Where the tenant suffers judgment without giving notice, &c. the court will not suffer execution to be taken out *till* the right be *tried*.

[N. B.]

In the present case, *a stranger may get the possession*, unless the lord be admitted to defend his title. It is not worth the tenant's while, to defend it: for, *his possession* will be determined immediately, *which-ever* side prevails.

Suppose it had been a *vacant* estate; the lessor of the plaintiff must have sealed his lease upon the land, and set up a casual ejector. But by *Comberb. 13.* The court would not, in that case, have suffered *execution* to be taken out, *without a trial* and *making out* his title. And the court would have permitted the lord by escheat to have seen that the title was *well* made out. Consequently, the court *would*, in such case, *have admitted* the lord to *defend*; in order to *oblige* the plaintiff to go down to trial and make out his title.

And there is as much reason to do it, where the tenant *deserts* his claim.

Suppose two persons, one claiming as heir, the other as lord by escheat, *both* bring ejectments, and *both* recover judgment; how shall the sheriff know *to which* of them he is to deliver possession?

(f) Qu. For it is only thus—N. B. 10 E. 4, 14. *h.* by “*Moile* the lord by escheat shall have all the charters “which concern the same land;” and the reason thereof is as “*Poph. C. J.* said, because the lord by escheat is in “the post and cannot vouch.”

(g) What is here cited from *Comberbach* is the whole of a wild anonymous case in *Comberb.* which is contrary to known practice, and to the case in *Barnes, 177.* as in part appears by the report of it there.

This method, of admitting a lord to defend, will prevent a circuit of litigation.

Then he answered their cases; viz. * *Roe v. Doe*, in *Barnes*; and † *Scarisbrick's case*. We do not know the circumstances of the case of *Roe v. Doe*: but there had been a long possession on the other side. *Scarisbrick's case* is within the rule.

We desire only an opportunity to TRY THE TITLE.

Lord MANSFIELD—We have thought very fully of this matter, since it came on last: and we are all of opinion that it must be tried between the two claimants, the heir and the lord. The occupier has no interest or concern in the question. He ought not to take a side; or prejudice either. (h) He does not appear. The question should therefore be tried in a way to give neither any advantage from his possession. It may be done, in a *feigned issue*: or, an ejectment brought by the lord, with an admission of his title, will come to the same thing.

Whereupon the court recommended, and the counsel on both sides consented to a fair trial of the lord's title to claim by escheat: (i) and the method was, at length agreed upon: viz. that the lord (who could never come into possession without an ejectment to be brought by him,) should immediately bring his ejectment against the present lessors of the plaintiff: and that the said lessors of the present plaintiff (who claimed as heirs of the deceased) should be admitted to defend, either alone or together with the tenant in possession; and such ejectment to be tried at the next assizes. And the counsel for the present plaintiffs were to admit "that all the lands lie in one and the same manor, "and that such manor belongs to Earl Gower as lord "of it."

1762.

FAIR-
CLAIM
admiss.
FOWLER
v.STAM-
TITLE.* 2 Barnes Ap-
pendix, 28.
† Vide ante,
p. 1291.
in margin.

[1301]

(h) It seems that the tenant did right, for the reason abovementioned in this page, opposite the N. B.

(a) How is this consistent with what is mentioned in the last page, of trying the question in a way to give neither any advantage from the tenant's possession? And qu. if it was possible for the question to be tried in that way between the contending parties; for the *onus probandi* would lie on the plaintiff's lessor, and how could it be tried without making some of them lessors of the plaintiff? for the court neither could nor ought to oblige the occupier to defend several ejectments to be brought against him by the several claimants; therefore qu. whether the court ought to have interposed at all in this case?

1762.

FAIR-
CLAIM
ex dimiss.
FOWLER
V.
SHAM-
TITLE.

And THE COURT reserved the consideration of the present motion and of the rule now depending, till *after* such trial should be had: which they did, in order to retain the power over the matter, in case any thing should be attempted at the trial, contrary to the real present intention of having the question fairly tried; and also in order to give such future directions concerning the award of execution, as should then appear to be fit and proper.

Note—

Mr. Justice WILMOT observed that it was very remarkable, that two different acts of parliament had been made, at near 500 years distance, upon the very same subject, where there was no occasion for either: viz. the statute of *Westminster 2.** (13 Ed. 1. A. 1285.) and this act of 11 G. 2. c. 19.

* Westm. 2.
c. 3.

The statute of *Westminster 2. c. 3.* he said, was not a *new* provision; for, *before* that statute, all those that stood *behind* the tenant in possession had always a right *at common law*, to come in and be received, *pro interesse suo*, to defend the possession; which was very material to them, and by the change whereof they would have been greatly incommoded. And he said he was persuaded that the more this doctrine of *deceit* was looked into, the stronger this would appear. And therefore he wondered that there should have been any doubt, before the act of 11 G. 2. of admitting landlords to defend in the *stead* of the tenant in possession; especially, as they were suffered to make themselves *co-defendants with* the tenants. (He referred to Lord Coke and to Bracton: but did not † specify the particular passages or pages.)

† V. 2 Inst.
344, 345. and
[1302]
Bracton, lib.
5. fo. 393. b.
No. 14.

So, *before* the act of 11 G. 2. c. 19. It was certainly the practice to admit the landlord and the tenant in possession *co-defendants*.

He took notice likewise, that notwithstanding all the pains that the legislature had taken to cut off dilatories, yet it was the *courts of Westminster-hall* to whom the public were *obliged*, for finding out this *easy* and *expeditious* method of trying titles by EJECTMENTS.

Lord MANSFIELD asked the counsel on both sides, “ if they had found any case *prior* to that of *Goodright v. Hart*, et ux. P. 2 G. 2. in * Sir J. S. where “ the court had refused to let in persons who stood *behind* the tenant in possession, to defend *pro interesse suo*, in the *stead* of the tenant in possession.

* 2 Sir J. S.
830.

Answer—None at all.

Lord MANSFIELD—Then there is *no other* but that which denies the authority of the case in 12 Mod. 211.

The precedents *before* are more liberal.

In 1652, it was said by the protonotary, "that the court would upon terms, allow him who alledged title, to defend it." (a)

In the 7th of King *William*, Lord *Bath* claiming the reversion by deed, after the death of tenant for life, who received the rent, was admitted a defendant, *because* it might shake his title.

In the 10th of King *William*, it is laid down as a certain rule, "if notice in ejectment be given to an under-tenant; and he doth not acquaint his landlord there-with, but suffers judgment to go against him; the court, upon motion, will not suffer execution to be taken out *till* the right be *tried*." Which is decisive, that the landlord should not be betrayed, but might defend *alone*.

In the first of Queen *Anne*, *Holt* says, "it is due, of right, to the landlord, to be made defendant: for otherwise, the tenant in possession might combine with the lessor of the plaintiff, and oust the landlord of his rent. And to deny the lady that right, would be upon the presumption of her marriage; which would be directly to determine the point in question." The combination of the tenant in possession could not be prevented, *unless* the landlord might defend *alone*. And the rule is laid down in a case *like* the present, where the question turned upon "*who was* landlord."

Thus stood the reasoning and practice, when the motion was made in *Goodright v. Hart et ux.* in 2 G. 2. It seems to have been very little considered. The only reason given why the tenant might betray his landlord by refusing to appear, ("because the landlord was made a defendant *und cum* the tenants in possession,") equally, at least, proved the *contrary*. It was a breach of the rule, in the tenant, to *prevent* his defending. No wonder Sir *John Strange* adds a "*quære tamen*;" for, this is giving tenants much too great a power; and makes them absolute masters of the estate, and to choose their own landlords." The court refusing to relieve the landlord, he practised with the tenants, to attorn. Then the plaintiff in ejectment moved: but was denied relief. So the court first suffered the plaintiff in ejectment, by corrupt practice with the tenants, to dispossess the landlord by a judgment, without any opportunity of trial; and then suffered the landlord, by corrupt practice with the tenants, to defeat the judgment and pos-

1762.

FAIR-

CLAIM

ex dimiss.

FOWLER

v.

SHAM-

TITLE.

Comberb.

939.

12 Mod. 211-

[1303]

Strange 830.

(a) *Style*, 368. But note that this case in *Style* is very shortly reported, and in the latter part of it not intelligible, though the unintelligible part is here omitted.

1762.
FAIR-
CLAIM
ex dimiss.
FOWLER
v.
SHAM-
TITLE.

[1 Black. 166,
169]

session given in consequence thereof. This case certainly occasioned the clause in the act of parliament relative to this subject. As the parliament has contradicted it, one may venture to say, "it was *hasty*." Every reason of private justice and public convenience, and every authority was the other way.

A RULE by consent having been ordered to be drawn up against to-day,

Lord MANSFIELD now declared, that he was clear that this method of "putting the person claiming to be lord by escheat to bring his ejectment;" was the proper way of trying the right upon the merits.

If there was really no heir, then the lord stood in the place of the deceased: but if there was any heir who-soever, the lord's claim was at an end.

The court would have obliged him to come into some method of trying the right, in a proper issue; and this method into which it was now put, (*viz.* his bringing an ejectment,) is the most proper issue for that purpose.

[1304] If the heir had refused, the court would have admitted the lords to defend; which would have given them the benefit of possession. If the lords by escheat had refused to consent, we would have discharged the rule. For certainly, where the sole question turns upon "who ought to be landlord to the tenant in possession," he should stand *neuter*, and his possession avail NEITHER: the question ought to be tried *between* the CLAIMANTS. The plaintiff must consent: else, the other is admitted to defend; (as in the case of *Fenwick* and *Gravenor*.) The other must consent: because to insist "that he is landlord," *begs* the question to be tried.

RULE by consent, as before, p. 1301.

Friday, 5th
Feb. 1762.

REX versus HEYDON, HEAD, and ROPER.

Costs allowed
upon infor-
mations for
misdemeanors
for not going
on to trial.

UPON informations for misdemeanors.

Mr. Morton, on behalf of the defendants, moved to discharge a rule for referring it to me "to tax costs to be paid to the defendants, for the prosecutor's not going on to trial." These were three informations for bribery at an election to parliament. And the same rule had been made in all the three causes.

[See ante
1270, post.
1359. and
2 Durn. 146.]

He moved it, first, on a point of law; secondly, upon the merits.

First, there were no costs at all, he said, upon informations, before the statute of 4, 5 W. & M. c. 18. And by that act* the court have no authority to give costs

* V. § 3.

against the prosecutor, *till* he shall have neglected to prosecute with effect for the *space of a year*: the words of it are—"In case the prosecutor shall not *within one whole year* next after issue joined, procure the same to "be tried." But this is *within* the year.

Secondly, the merits were, that the adverse party *detained* the books, which were the prosecutor's only evidence; which *detention* obliged the prosecutor to withdraw his record, and was the only reason of his not going on to trial.

Mr. Stowe and Mr. Ashurst, *contra*, for the defendants.

First, the act of 4, 5 W. & M. c. 18. § 3. means the final event of the cause; and relates only to the not proceeding at all in the cause for a whole year.

But by the *course of the court*, without any aid from this statute, a prosecutor shall pay costs for the *vexation of not going on to trial*, without countermanding his former notice of trial: and they mentioned a case of † *Rex v. Rossier et al.* where precedents of it *upon informations* were cited. ‡ *Executors* shall pay costs for *not going on to trial*.

Secondly, the defendant is not bound to *furnish* the prosecutor with evidence against himself. He should have come prepared; and ought not to have given notice of trial, *till* he was prepared.

The counsel for the plaintiff in reply—

Upon the gentlemen's *own* principle, the prosecutor ought not to pay costs in this case: for here was *no vexation*, or any thing like it; nor is there any reason why the court should punish the prosecutor in costs. He had reason to expect that the books would be produced at the trial; the defendants gave him hopes of producing them.

Lord MANSFIELD—First, by the constant *course of the court*, the defendant is intitled to costs, if the prosecutor gives notice of trial, and neither *goes to trial*, nor *countermands* it in time: and no instance can be produced, that I know of, to the contrary.

Secondly, yet if the defendant *had drawn the prosecutor in*, to give notice of trial, *by* giving him hopes of producing any books: *that* might be a reason for not giving the defendant any costs.

But no such thing appears in this case: there is no colour, upon the affidavit, to say it.

Therefore there is no reason to except this *out* of the *general* rule.

Mr. Justice DENISON---I am of the same opinion.

Mr. Justice WILMOT---And I.

(Mr. Justice FOSTER was absent.)

NOTHING taken by the motion.

VOL. III.

F

1762.

REX

v.

HEYDON.

[1905]

† In Trinity term 1761.
‡ There were so; viz. Rex v. Allen and Hazard, M. 5 W. and M. (v. Comberb. 225) and Rex v. Earle, Tr. 4 G. 2. (v. Stra. 874.) See Salk. 193. Rex v. Edwards; and 1 Stra. 33. Rex v. Powell, et al.

1762.

Saturday, 6th
Feb. 1762.
New trial not
granted in an
hard case.

REAVELY versus MAINWARING, Esq. WALKER et al'.

THIS was an action of trespass *vi et armis*, for taking five boys, apprentices to the plaintiff, out of the hands of the plaintiff.

Lord MANSFIELD, who tried the cause, reported the evidence.

These were apprentices regularly bound to *Reavely*, for the sea service. The action was trespass *vi et armis*, for taking them.

It was proved, on the part of the plaintiff, that they were voluntarily indentured to him; and were by his direction delivered to one *Jones*, to be kept by him, to prevent their running away. Part of *Jones's* house was a prison; part, a public house.

The justices, at their session of gaol-delivery, upon a complaint of "an intention to sell them in *Guinea*," discharged them.

Reavley ordered them to be put into the hands of *Jones*. *Walker* sent a note to *Jones*, to deliver them to the lieutenant of a tender of a man of war: who thereupon delivered them, and took a receipt for them.

This was the evidence for the plaintiff.

On the part of the defendants, it appeared that one *Lane* told *Walker*, of the boys complaints, and of the affecting scene that he had seen.

One of the boys also gave evidence of *Blackwood's* picking them up; and of their being deceived, and ill used at *Jones's*, and their endeavours to escape. That *Walker* and *Pell* came to the prison: and the boys made their complaints to them. Upon which, they were sent for to the court-house: and they all made their complaints to the justices, of their being deceived, imprisoned, ill used, &c. and their apprehensions of being sold. The plaintiff, next morning sent coaches to carry them away. They resisted. *Walker* (who was lieutenant of a man of war) being present, asked them if they were willing to serve the king. They assented. He sent a press-gang. They went with their own consent. They begged of the justices to be set at liberty. They were brought into court before the justices as prisoners.

[1307.] But no commitment being produced, the justices discharged all and each of them, by writing against their names—"discharged." *Walker* bid *Jones* to keep them that night. But there was no order to deliver them to *Walker*: they were only discharged from being kept as prisoners. Whereupon *Walker* asked if they were willing to serve the king: to which they assented. And

Walker gave *Jones* a guinea to take care of them that night.

At the trial, all the defendants were found "not guilty;" as well the justices as the lieutenant.

Mr. *Yates* now shewed cause against a new trial, which had been prayed by the plaintiff.

He insisted, that as the boys were in the hands of *Jones*, who, he said, was agent to the plaintiff, and delivered them to the lieutenant who commanded the press-gang, upon a note from *Walker*, and took a receipt for them from him; here was no force: therefore trespass *vi et armis* will not lie. It ought to have been an action upon the case, or an action upon the statute of labourers; for which, he cited *Bro. Abr. Title Labourer*, 21, 28. as in point. 6 *Mod.* 182. *Queen v. Daniel*, (the second resolution) is in point also, "that a common action of trespass will not lie, for enticing an apprentice or servant from his master, if there be no force."

And here, *Jones's* delivery was the delivery of the plaintiff: he was the owner's agent.

Mr. Solicitor General and Mr. *Morton*, on behalf of the plaintiff, did not dispute the law, but the fact.

The justices discharged the boys: they were put into the hands of *Jones*, by the justices. *Walker* ordered them out of *Jones's* hands into the hands of the lieutenant who headed the press-gang.

Here was no seduction or incitement; but a forcible taking away a man's apprentices by a press-gang, and carrying them on board a man of war: in which, *Walker* was concerned, as having actually sent the press-gang to fetch them. And in trespass, all are principals.

LORD MANSFIELD---It was objected, at the trial, that *Walker* could not be liable to an action of trespass *vi et armis*: for that *Jones* delivered them up voluntarily to the lieutenant.

But I thought then, and now think that he was liable to this action; because he sent a force, a press-gang, to take them. [1308]

As to the justices---There was no colour to maintain the action against them.

A special jury of gentlemen found all the defendants not guilty.

I think they ought to have found *Walker* guilty, upon the evidence that was laid before them. Yet it would have been very hard, if *Walker* had suffered for his behaviour upon this occasion; because he seems to have acted with good intentions.

Therefore I think there ought not to be a new trial.

RULE to shew cause "why there should not be a new trial"—DISCHARGED.

1762.

REAVELY
V.
MAIN-
WARING
and
WALKER
et al'.

1762.

REX
v.

CLARKE.

[See 16 Vin.
259.]Prosecutor
cannot prose-
cute in forma
pauperis.* V. Rex v.
John Spooner,
28th Nov.
1770.B. R. (which
was an infor-
mation.)REX *versus* CLARKE, et al'.

MR. Nash moved to make a rule absolute, (on a proper affidavit of service,) for admitting a PROSECUTOR of an *indictment* to PROSECUTE *in forma pauperis*.

But THE COURT, (on being apprized that it was on behalf of a *prosecutor*,) denied to make the rule absolute; as it was founded only on the common petition and affidavit usually produced by DEFENDANTS in order to *their* obtaining such a rule: for, they held that PROSECUTORS ought not to be admitted to *prosecute in forma pauperis*, unless some *special ground* was laid for the motion.

And Mr. Justice WILMOT observed that in *civil* cases, *plaintiffs* were not admitted to *sue in forma pauperis*, unless *counsel certified* "that there was some foundation for their suing."

REX *versus* INHABITANTS OF MINCHIN-HAMPTON.Friday, 12th
Feb. 1762.

Beech being
timber ac-
cording to the
[1909]
custom of the
place is not
rateable to
the poor's
rate.

SAMUEL SHEPPARD, Esq. having appealed to the quarter-sessions of the county of *Gloucester*, from a rate (confirmed by two justices of the peace) which charged him for some *wood-lands* which he owned and occupied; the sessions upon such his appeal, discharged *that part* of the rate, and amended it with respect to the charge upon Mr. *Sheppard*; holding him *not* to be rateable for them, upon his particular case; which they stated to be as follows, *viz.*

That the said *Samuel Sheppard* is owner and occupier of two hundred and fifty acres and upwards of wood-land in *Minchin-Hampton*. The wood growing thereon consists *chiefly* of BEECH, and some oak and ash. There is no coppice wood. The *under wood* is left to grow as *standards*. Great quantities of such beech wood have yearly been cut and sold by the said *Samuel Sheppard*, (and in the two last years, forty or fifty cord each year, for FIRE-wood; of the value of from twenty-three shillings to twenty-six *per cord*: all which said wood so cut for *cord-wood* is of thirty years growth, or upwards; and some, of sixty or eighty years; and, generally, from *ten to twenty inches square*. That *many of the largest beech-trees* cut in such wood, are sold as *cord-wood* and *faggots for fire-wood*; and that the other of such trees cut therein, are sold for making *gun-stocks, saddle-trees, and card-boards*; and *some part for building*. That *pigs* were let run in those woods, for the eating of the masts: for which the proprietor had a *pecuniary* profit, when so done. That *twenty pounds* worth of such wood is sold for *fire-wood*, to *twenty shillings* worth sold for *any other purpose*. And

in the last year there was made a clear fall of three or four acres. The sessions are of opinion "that such woods are not rateable to the poor's rate, by law." 1762.
 REX
 V.

On the last day of Michaelmas term 1760, Mr. Price, on behalf of the parish, moved to quash this order of sessions; urging that Mr. Sheppard ought to be rated for these under-woods, as SALEABLE under-woods, within the express words of 43 Eliz. c. 2. though some part of the produce of this two hundred and fifty acres of wood had been used for building: for it is stated, that twenty pounds worth was sold, for twenty shillings worth used in building. And he had a

RULE to shew cause.

On Saturday, 7th Feb. 1761, instead of shewing cause, why this order of sessions should not be quashed;

Mr. Norton, (now Sir Fletcher Norton,) who was for discharging the rate, insisted that beech was esteemed TIMBER in that country; and that it ought to have been, and was intended to have been so stated: and that therefore the case was imperfectly stated, and ought to be sent down again to be re-stated. [1310]

Which was denied by Mr. Gould, who was counsel on the other side.

After much litigation,

THE COURT directed that it should be sent down to be re-stated; and that Mr. Norton's client should pay the costs hitherto incurred.

On Monday, 23d November 1761, M. 2 G. 3. The re-stated order being sent up, a rule was made (as before) to shew cause why it should not be quashed.

The words of the new state are as follow,—“ We are of opinion, that the same wood, BEING timber-trees as aforesaid, are not rateable to the poor's rate, by law.”

On the last day of that term, Mr. Serjeant Nares, (who was for quashing the order) offered to try, in a feigned issue, “ whether beech-wood is TIMBER, by the particular custom of that country.”

Lord MANSFIELD—Beech is certainly not timber by the general law of the land: yet it may be timber by the particular custom of the place; I do not mean, of the county, but of that particular part of the country where the trees grow.

Therefore let it go back to the sessions, to be positively stated, “ whether beech is or is not timber, there.” For, they have not yet stated positively, whether it is or is not so.

Hilary Term 1762. 2 G. 3.

The order being returned up again, is as follows, viz.

Upon the re-hearing of the appeal of Samuel Sheppard,

1762.

REX

V.

MINCHIN-
HAMPTON.

{ 1311]

of *Minchin-Hampton* in this county, esq. in pursuance of and in obedience to another rule of his majesty's court of *King's Bench* made in *Michaelmas* term last, against part of the rate or assessment made for the relief of the poor of the said parish of *Minchin-Hampton*, that is to say, touching the sum of money charged upon him the said *Samuel Sheppard*, in respect to and for certain woods of the said *Samuel Sheppard* in the said parish of *Minchin-Hampton* in his own possession; this court, having fully re-heard as well the said *Samuel Sheppard* as the churchwardens and overseers of the poor of the said parish of *Minchin-Hampton*, touching the said appeal and premises, do find, adjudge, and finally determine, that the said *Samuel Sheppard* is charged for his said wood there, *being* **TIMBER trees**, when in fact he ought not to have been charged for the same, and is thereby aggrieved: it is therefore ordered by this court, that the said rate or assessment (now brought again into court) be forthwith amended in court, in respect to him the said *Samuel Sheppard*, as to the *item* therein, where he is charged for the said woods; and that the said *item* or charge in respect thereof be entirely *struck out* of the said rate or assessment; and that he the said *Samuel Sheppard* be and is hereby absolutely *acquitted, exempted, and totally discharged of and from all payments* charged or rated in the said rate or assessment *upon his said woods* as aforesaid; the case appearing to be, that the said *Samuel Sheppard* is now owner and occupier of two hundred and fifty acres and upwards of *wood-lands* in the said parish of *Minchin-Hampton*; that the wood growing thereon consists *chiefly of beech*, and some oak and ash trees; that there is *no coppice wood*; that the *under-wood is left to grow as standards*; that BY THE CUSTOM OF THE COUNTRY where the aforesaid beech, oak and ash trees grow, (being the trees in question on this appeal,) **BEECH IS TIMBER**; that great quantities of such beech-wood have yearly been cut and sold by the said *Samuel Sheppard*, (and in the two last years, forty or fifty loads each year,) for fire-wood, of the value of from twenty-three shillings to twenty-six shillings *per cord*; all which said wood so cut for cord-wood, is of thirty years growth or upward, and some of sixty or eighty years, and generally from ten to twenty inches square; and that many of the largest beech trees cut in such wood are *sold as cord-wood*, and the *faggots for fire-wood*; and that the other of such trees cut therein are *sold for making gun-stocks, saddle-trees and card-boards*, and *used as timber*, for the several purposes of building, but not so frequently as elm or oak; that *pigs* were let run in those woods, for the eating of the masts; for which, the proprietor had a pecuniary profit, when so

done; and that twenty pounds worth of such wood is sold for *fire-wood*, to twenty shillings worth sold for any other purpose; and last year, there was made a clear fall of three or four acres. And THEREFORE, we are of opinion, "that BY THE CUSTOM of the country where the trees and woods in question as aforesaid grow, BEECH" IS TIMBER, and therefore not rateable to the poor's rate by law."

1762.

REX
v.MINCHIN-
HAMPTON.

On Saturday, 6th February 1762, Mr. Serjeant Nares moved to quash this order: for that although the sessions have now indeed returned it as their opinion, "that [1312] beech is timber in that country, by the custom of the country;" yet they have drawn their conclusion from wrong premises, which they state particularly, and conclude that THEREFORE they are of that opinion. So that the court will judge for themselves, whether the sessions have determined right, or not.

A RULE was thereupon made to shew cause why the said new order should not be quashed.

The said new order being now read,—

Lord MANSFIELD said, that though the justices at sessions state a great many things that are immaterial, yet they expressly state "that beech is timber by the custom of that country." It is not the use it is put to, that makes it either timber or not timber: its being or not being timber depends upon the custom of the country. And if it be timber by the custom of the country, it must be presumed (and it may be true in fact) "that it was timber before the time of Queen Elizabeth."

[See 2 P.Wms.
606. Moor,
812. acc.
Bunb. 192.
pl. 269. acc.
2 Burr. E. L.
410. acc.]

The ORDER of SESSIONS must be AFFIRMED.

The End of Hilary Term 1762. 1 G. 3.

1313-1314

EASTER TERM,

2 GEO. III. B. R. 1762.

REX *versus* SMOLLET;

REX *versus* HAMILTON.

Monday, 10th
May, 1762.

Clerk in court
and attornies
bill taken to-
gether, to be
paid into the
hands of the
clerk in court.

MR. Solicitor General moved on *Thursday* last, in behalf of Mr. BARLOW, *clerk in court* for Admiral Knowles the prosecutor in these causes, to whom the executrix of his late attorney Mr. Chapone (lately deceased) had delivered a bill, which included Mr. Barlow's bill in these causes, which bill of Mr. Barlow's had already been taxed, as well as Mr. Chapone's own bill; that Mr. Knowles might be at liberty to pay to Mr. Barlow his bill as clerk in court; and that on payment of the remainder of Mr. Chapone's bill to the executrix of Chapone, she should deliver up to him all his papers and writings remaining in her hands.

V. 2 J. S.
1126.

And he cited a case in *Hilary* Term 1739, 13 G. 2. B. R. where the like rule had been made, for the payment to Mr. Henry Walrond, by Sir John Rushout and Mr. Rudge, of Mr. Walrond's bill, after the death of Mr. Ingram, attorney for Sir John Rushout and Mr. Rudge, in the *Evesham* causes: which bill of Mr. Walrond's as clerk in court in the cause between the King and Biddle, was included in Mr. Ingram's bill delivered to them.

Lord MANSFIELD said, it was so plain, and so obviously just and reasonable, that it did not want any precedent to support it. Accordingly, a rule was made to shew cause.

And, it was NOW MADE ABSOLUTE.

[1314]
[S. C. 1 Black.
364.]

Wholesale
traders
need not take
out a licence
from the
hawker's
office.

MAXWELL *versus* MAYER.

THIS was an action of trespass, for taking the plaintiff's goods: to which, "not guilty" was pleaded. On the trial at *nisi prius*, a case was reserved for the opinion of the court.

The case stated was this—

That the plaintiff was a native of Scotland. That he was a hawker and pedlar, carrying linen goods of the manufacture of SCOTLAND, from town to town in ENGLAND;

and exposing them to sale, in a room in each town, by *wholesale only*. And that he traded in *St. Sampson's* parish in *York*, *without any LICENCE*.

1762.
MAXWELL
V.
MAYER.

That upon an information duly made against him for this before the defendant, who was a justice of peace for the city of *York*, the plaintiff was required by the defendant, the justice of peace, to *produce a LICENCE* for so doing: but he insisted, that it was *NOT necessary* for him to have a licence; as he was a *native of Scotland*, a *wholesale* dealer in linen of the *manufacture* of *SCOTLAND*, and sold by *wholesale only*.

* V. 3 Ann.
c. 4. s. 4.

That the defendant thereupon convicted him in the penalty of twelve pounds; which penalty he refused to pay. That the defendant, the justice of peace, therefore issued his warrant to distrain, &c. which was executed, &c. And for *this*, the present action was brought.

The question was, "whether the plaintiff (who was a *native of Scotland*) being a *wholesale* dealer in *linens* of the *manufactures* of *SCOTLAND*, was obliged "to take out a *LICENCE*, to qualify him to trade thus, "by *wholesale* in *ENGLAND*."

* V. 3 Ann.
c. 4. s. 4.

It was first argued on *Tuesday 26th of November 1760*, by *Mr. Clayton*, for the plaintiff, and *Mr. Yates* for the defendant; and again, on *Friday 6th of February 1761*, by *Mr. Aston* for the plaintiff, and *Mr. Norton* for the defendant.

For the plaintiff, it was insisted, that the *union* took away all distinction between the two kingdoms, and between the natives of one or the other; and that the *manufactures* of *SCOTLAND* are, since the union, the manufactures of "THIS kingdom," within the meaning of 9, 10 *W. 3. c. 27. § 1, 2, 3*, taken together with the following sections, 4, 6, 14, 18, and 25: (upon which act of 9, 10, *W. 3.* this conviction was founded.)

[1315]

And all claims arising under *subsequent* statutes are good and valid for the future, under *precedent* statutes; though they did not even exist, when the former statutes were made. In *Plowden*, 120, and 127, a. b. *Sir Richard Bulkley v. Rice Thomas*, upon the stat. of 27 *H. 8. c. 26.* (uniting *England* and *Wales*.) upon the third exception; *Brooke*, *Saunders*, and *Browne* were of opinion for the plaintiff. *Staundforde*, *Puysne* *Justyce* held indeed for the defendant: but the three others held, "that the subsequent statute communicated the remedy given by the "preceding one."

By 5 *Co. 40. b. Vaughan's* case, second resolution, "all the statutes of *England* extend to *Wales*; because "*Wales* is made parcel of *England*."

And so also the legislature declared, in 20 *G. 2. c. 42. § 2.*

1762.
MAXWELL
V.
MAYER.

THE COUNSEL for the defendant argued, that the present question depends singly upon the acts of parliament made relating to *hawker and pedlars*; and that where several laws are made relative to the same thing, all of them must be taken *together*, or as one law.

The act of *union* did not mean or intend to meddle at all with the *hawkers* acts. And the *Scots* have never borne any part of the *burthen* imposed by the acts relating to hawkers and pedlars: therefore they are not intitled to the benefit of them.

The act of 5 *Ann.* parliament 2. sess. 2. c. 19. § 1. continues the hawkers act for 96 years, without saying a word about *Great Britain*: and this act was made immediately after the union.

The 6 *Ann.* c. 5: § 4. continues these duties, within the *whole kingdom of Great Britain*, for *one year after* the expiration of the 96 years. So that this question can not properly arise, till *after the year 1806*.

The exemptions of 3 *Ann.* and of 9 *W.* 3. must be taken to be *equally extensive*: for, the *provisions* are the same in both.

This law never attaches upon the *manufactures of Scotland*. The hawkers act does *not extend* to them: therefore it can *not exempt* them. Nor ought it to extend to them, when the *burthen* does not. And it is a *great advantage to Scotland*, that *neither* the burthen nor the exemption do, for 96 years, extend to them.

And for this reason, the arguments from *Plowden* are out of the case: neither do the arguments from 5 *Co. Vaughan's* case, apply to the present case.

An *exemption* presupposes a *lien*. But here is *no lien*: therefore there can be *no exemption*.

And they alledged that their construction of these acts of parliament were confirmed by usage.

THE COUNSEL for the plaintiff replied that *every* man who sells these manufactures *in England*, is liable to the burthen: it is the *selling in England*, that renders them liable to the burthen, and within the exemption, therefore the burthen and the exemption are *co-extensive*. This is no *particular* or *local* regulation of trade: it is a benefit of trade, *in general*.

The *Scotch* do bear the burthen imposed by the hawkers and pedlars acts, *equally* with the *English*: and they are *equally* obliged to take out a *licence*, if they sell manufactures *not exempted* out of those acts.

THE COURT thought it proper that the following facts should be ascertained, before they gave their opinion; viz. "Whether, since the union, persons coming from *Scotland*, and bringing linen or woollen goods into *England*, and selling them *by wholesale*, do or do

“not usually take out licences:” or “whether there have been any, and what *convictions* of such persons who have sold *Scotch* linen thus by *wholesale*.” 1762. MAXWELL

After having taken time to inquire into these facts, and to consider it.— V. MAYER.

Lord MANSFIELD now delivered the resolution of the court.

He said they had had certificates from the commissioners, and answers to them; and replies, and rejoinders, and surrejoinders without end: but upon the whole, they (the court) were clear that there was no pretence for supporting such an *USAGE* as had been pretended on the side of the defendant.

The *USAGE* then being out of the case, the single question is, “whether the linen manufactures of *Scotland* is [1317]
“or is not the linen manufacture of *THIS KINGDOM*,
“within the act of 9, 10 *W. 3. c. 27.* and the act of
“union.”

And we are of opinion, “that the linen manufacture
“of *Scotland* is the linen manufacture of this kingdom,
“within those acts.”

The argument “that the *Scots* are not intitled to the
“benefit, because they *have* never borne any part of the
“burthen,” does not conclude to the point; because they
will bear their part of the burthen, from the time when
the legislature have thought proper that it should *commence*
upon them.

Therefore let the *postea* be delivered to the PLAINTIFF.

REX *versus* INHABITANTS of ST. DEVEREUX.

Thurs. 19th

This case is already published, in my quarto edition of May, 1769.
SETTLEMENT CASES, No. 162. page 509.

REX *versus* WILLIAMS.

REX *versus* DAVIS.

Saturday, 15th
May, 1769.

AN information was granted by the court against the defendants, as justices of the peace for the borough of *Penryn*; for refusing to grant licences to those publicans who voted against their recommendation of candidates for members of parliament for that borough. It appeared, that they had acted *very grossly* in this matter; having *previously threatened* to ruin these people, by not granting them licences, in case they should vote against those candidates whose interest these justices themselves espoused; and afterwards *actually refusing* them licences, *upon this account only*. And Lord MANSFIELD declared, that the court granted this information against the justices, *not* for the *mere refusing to grant* the licences, (which they [See Andr. 180.
1 Burr. 556.
2 Burr. 659.
Doug. 566.
692. and post.
1318.]

Information will lie against justices of the peace, for corrupt and oppressive practices.

1762.

had a discretion to grant or refuse, as they should see to be right and proper;) but for the *corrupt motive* of such refusal; for their *oppressive** and *unjust* refusing to grant them, BECAUSE *the persons applying for them would not give their votes for members of parliament as the justices would have had them.*

Friday, 21st
May, 1762.

REX versus BAYLES et al. JUSTICES of Peace for the
CITY of GLOUCESTER.

Unless justices
act corruptly
and oppres-
sively an in-
formation
will not be
granted.

THE same PRINCIPLE was laid down in this case, as in the last mentioned case; though the present rule "for shewing cause why there should not be an information," was discharged, upon the *merits*; the justices not appearing to the court to have acted from the corrupt motive which the prosecutor of the rule had charged upon them.

V. ante, S. P. Pasch. 1758, 32 G. 2. pa. 556, 561. Rex v. Young and Pitts, esqs. and pa. 653. Rex v. Athay, Mich. 1758, 32 G. 2.

The End of Easter Term, 1762. 2 G. 3.

TRINITY TERM,

1319-1320

2 GEO. 3. B. R. 1762.

COLEBROKE *versus* DOBBS.

Wednes. 16th
June 1762.

THE plaintiff having obtained judgment against the defendant, in an action of debt for an amercement in the court leet of the manor of *Stepney*, the counsel for the defendant moved in arrest of judgment; and the case remained long depending: the first motion was made by Mr. *Altham*, on *Wednesday* 26th *January* 1757; the judgment of this court was pronounced on *Friday* 26th *January* 1759: and the *Exchequer* chamber affirmed it, in this *Easter* term 1762. It was debated on *Friday*, 10th *February* 1758, by Mr. *Altham*, supported by Sir *Richard Lloyd*, on the part of the defendant; and Mr. *Lawson*, supported by Mr. *Norton*, on the part of the plaintiff: and the court took time to look into the record.

The court of *King's Bench*, in *Easter* term 1758, directed the case to be set down in the paper as a *conciliium*, for argument in the next following term, and to be then spoken to by one counsel on each side. It was afterwards set down accordingly, in the paper; and stood for argument upon *Friday*, 26th *January*, 1759: but the defendant's counsel said he was not prepared: having received his brief, but the preceding evening.

THE COURT told him, that was his client's own fault: the defendant ought to have been ready. And they ordered the *POSTEA* to be delivered to the PLAINTIFF.

Note—The only reason of mentioning this case at all, is to prevent its being hereafter cited as an AUTHORITY; upon a mistaken apprehension of its having been determined in a *solemn* manner after argument and deliberation upon the weight of the objections.

REX *versus* RISPAL.

THIS was an indictment found at the *Westminster* sessions of the peace, against the defendant and

[1320]
Saturday, 19th
June 1762.
[S. C. 1 Black.
368.]

Conspiracies
are cognizable
at sessions.

See
108am
230
per 208

1762.

REX

V.

RISPAL.

two others, for a conspiracy: but the *certiorari* was brought by *Rispal* only.

The indictment set forth that *Antoine Rispal*, *Henry Bolney*, and *John Delaporte*, *wickedly and maliciously devising and intending unjustly to vex and aggrieve one John Chilton*, and to deprive him of his good name, fame, credit, and reputation, on, &c. at &c. wickedly, and unlawfully did among themselves CONSPIRE, combine, confederate, and agree, *falsely** and without any reasonable or probable cause, to charge and accuse the said *John Chilton*, "that he the said *John Chilton*, had then lately before "taken out of a bag, a quantity of human hair, which "bag was contained in a bale, which consisted of five "bags of hair, of the goods and chattels of the said "*Antoine Rispal*."

* See note in
2 Burr. 993.

That the said *Henry Bolney* afterwards, to wit, on, &c. at, &c. in pursuance of and according to the said conspiracy, combination, confederacy and agreement between him and the said *Antoine Rispal* and *John Delaporte* so as aforesaid before had, did say to the said *John Chilton* "that he the said *John Chilton* was a man "of credit: and that he the said *John Chilton* had better "make it up, than have his credit blasted."

That the said *Antoine Rispal*, in pursuance of and according to the said conspiracy, combination, confederacy and agreement between him and the said *Henry Bolney* and *John Delaporte* so as aforesaid before had, afterwards, to wit, &c. at, &c. unlawfully and wickedly did exact, receive, and had of and from the said *John Chilton* the sum of thirty pounds of lawful money of Great Britain, of the monies of the said *John Chilton*, and also a certain promissory note in writing, bearing date the said 28th day of February in the year of our Lord 1758, signed under the hand of the said *John Chilton*, for the payment of the sum of thirty-three pounds to one *Thomas Higginson* or order, six weeks after date, and which said note was indorsed by the said *Thomas Higginson* to the said *Antoine Rispal*; for and as a composition for the pretended offence above specified, and to desist from all prosecutions against the said *John Chilton* for the same; which said sum of thirty-three pounds hath been since paid by the said *John Chilton*, in discharge of the said note: whereas, in truth and in fact the said *John Chilton* never was guilty of the said offence so falsely charged on him as aforesaid, or of any such like offence.

[1321] To the great damage, impoverishment and disgrace of the said *John Chilton*; to the evil example of all others, in the like case offending: against the peace of our said late lord the king, his crown and dignity; and against the

peace of our present lord King *George* the third, his crown and dignity.

1762.

REX
V.
RISPAL.

The defendants *Bolney* and *Delaporte* pleaded "not guilty:" and the indictment was tried as against *them*, at the *Westminster* sessions. *Bolney* was acquitted: *Delaporte* was found guilty.

The defendant *Rispal* did not then come in: but he afterwards came in, and pleaded "not guilty:" and was tried and found guilty. Whereupon he brought a *certiorari* to remove it into this court.

On *Tuesday*, 26th *January* last, Mr. *Lucas*, on behalf of the defendant, moved in *arrest of judgment*."

First objection—An indictment for such a *conspiracy* as this is, does not lie before the general sessions of the PEACE.

Second objection—The fact which the defendant conspired to charge the prosecutor with is *no offence*: it is only an indictment for "wickedly and unlawfully conspiring &c. *falsely** to accuse *John Chilton* of [* See note in 2 Burr. 993.] "TAKING HAIR OUT OF A BAG;" (without alledging it to be an *unlawful* or *felonious* taking;) whereas the offence whereof the party was accused, ought to be *particularly charged*; no *implication* will make it good.

A RULE was then made to shew cause why the judgment should not be arrested.

Afterwards on *Thursday*, 29th of *April* following, Mr. *Lucas* enforced his objections in arrest of judgment; and Mr. Solicitor General for the prosecutor, shewed cause against arresting the judgment: and it was then adjourned.

On *Wednesday*, 12th of *May*, it was argued by Mr. *Baynham* for the king; and Mr. *Morton*, and Mr. *Stowe* for the defendant.

THE COURT were of opinion, that the justices of peace had jurisdiction in the present case; a conspiracy being a *trespass*, and tending to a breach of the peace; and they held, that the indictment was well laid; and that the gist of the offence is the *unlawful* conspiring to *injure* the man by this false charge. They all therefore concurred in opinion, that the rule ought to be discharged.

RULE DISCHARGED.

HART, *qui tam*, &c. versus HAWKINS.

[1322]
Tuesday, 29d
June 1762.
[S. C. 1 Black,
Rep. 373.]
Defendant in a
qui tam action
cannot be dis-
charged under
the lords act.

ON shewing cause against a rule which was drawn up generally, "to shew cause why the defendant should not be discharged out of custody of the marshal, as to the execution with which he stands charged in

1762.

REX

V.

HARRISON.

and still is a *body corporate*, by the name of the master, wardens and commonalty of the art or mystery of butchers of the city of *London*; and that the said company or society is and for all the time aforesaid hath been *one of the aforesaid companies or societies*.

The return then sets forth a *BYE-LAW*, made at a common council of the said city holden according to the custom, &c. on the 20th of *June 1727*; namely—That it was, by the authority of the same common council, in and by an act of the said common council, intitled “an act for regulating the company of BUTCHERS of the city of *London*,” enacted, ordained, and established in manner and form as follows, *to wit*, “WHEREAS the master, wardens and commonalty of the art or mystery of butchers of the city of *London* are and have been an ancient fellowship and long since incorporated, and have obtained several royal grants for confirmation of their privileges; and whereas many persons who exercise the trade of a butcher within the city of *London*, have obtained their freedoms of OTHER companies, by redemption and otherwise; by reason whereof, the said company of BUTCHERS is MUCH DIMINISHED and MAY FALL in decay; for remedy WHEREOF, be it enacted, ordained and established, by the right honourable the lord mayor, aldermen and commons of the city of *London* in this present common council assembled, and by the authority of the same, that from and after the 29th day of *September* next, every person not being already free of this city, occupying, using or exercising, or who shall occupy, use or exercise the art, trade or mystery of a BUTCHER within the city of *London* or liberties thereof, shall take upon himself the freedom and be made a freeman of the said COMPANY of BUTCHERS; and that no person or persons now using or exercising, or who shall hereafter use, occupy or exercise the said art, trade or mystery of a BUTCHER within the said city or liberties thereof, shall from and after the said 29th day of *September* be admitted by the chamberlain of this city for the time being, into the FREEDOM or liberties of THIS CITY, OF OR IN any OTHER company than the said company of BUTCHERS; any law, usage or custom of this city to the contrary notwithstanding: provided always, that all and every person and persons not being already free of this city, and who now are or hereafter shall be intitled to the freedom of any other company within this city by patrimony or service, and ought (in pursuance of this act) to be made free of the said company of butchers, SHALL BE ADMITTED into the freedom of the said company of BUTCHERS upon payment of such and the like fine and fees (and no more) as are usually paid and payable upon

"admission of the child or apprentice of a freeman of the same company."

1762.

REX
V.

HARRISON.

The return then sets forth, that the said *William Cope* was educated as an apprentice in the art, trade or mystery of a BUTCHER; and at the time of the presentment of the said *William Cope* to the chamberlain to be admitted into the freedom of the same CITY (as in the writ is mentioned,) *did use, occupy and exercise, and still doth use, occupy and exercise the art, trade or mystery of a BUTCHER, within the said city and the liberties thereof*; and that the said *William Cope*, at the time of such presentment as aforesaid, *was not, nor yet is a freeman of the said company of BUTCHERS.*

And for these causes, the chamberlain returns that he had refused to admit him into the freedom of the said CITY: nor can he admit him into it.

Mr. Yates, for the prosecutor of the writ, argued that this bye-law is totally VOID.

He premised, that *Wannell's* case, which he supposed would be relied upon by his opponent, and which is reported in 1 Sir J. S. 675, and in 5 Mod. 267, is distinguishable from this case.

Then he proceeded to object to the present bye-law.

First Objection—This bye-law is beyond their JURISDICTION.

Secondly, the CAUSE of making it is insufficient.

First—It exceeds the jurisdiction of the makers of it. For first, it varies the constitution of the city essentially; secondly, it injures all the other companies of the city; and thirdly, it restrains trade.

First, it essentially varies the constitution of the city. [1 Wils. 261] *Rex v. Philips*, in *Carmarthen*, Trin. 1748, is an authority to say that a bye-law contrary to the charter is not good.

Here, all persons, in general, intitled to be free of ANY company, were before the making of this bye-law, intitled to their freedom of the city: whereas this bye-law expressly confines these persons to be free of the particular company of BUTCHERS.

The case of *Robinson v. Gros court*, in 5 Mod. 104. is good law, notwithstanding the case of *Wannell*, above-mentioned. [1326]

Secondly, it injures all the other companies in the city, particular customs of the city may indeed be regulated: but ancient franchises can not be extinguished or dissolved by a bye-law. Now this bye-law is injurious to all the other companies.

Thirdly, It restrains trade. This bye-law narrows the privilege, and is an injurious restraint to trade and traders, and a clog to their liberty.

1762.
 REX
 V.
 HARRISON.

But it will be said, "that the mayor and aldermen have a *power, by the custom, to do this.*" To which I answer—The custom does not impower them to go so far as this bye-law carries it: here is an *additional expence* laid upon persons intitled to their freedom.

He mentioned 5, 6 *W. & M. c.* 10, § 6. which obliges every person free of any of the companies, who shall take an apprentice, to bind him before the master and wardens of the company, whereof the master is a member; which apprentice, at the time of his binding, is to pay them two shillings and sixpence: and cited 1 *Ro. Abr.* 364. Title *Bye-law*, PL 5. in the case of *Payne v. Hawghton*, a bye-law (about carmen and the hospital) holden void, because only for *private* benefit.

Second general objection—If the mayor and aldermen and common council really had power to make such a bye-law as this is, yet the *cause* here assigned for making it is *insufficient*.

Their bye-laws must be made for the *common good* of the citizens; where any ancient custom is *difficult* or *defective*: or any thing, *newly arising*, wants amendment.

But this bye-law is not agreeable to *any* of these requisites.

The return does not pretend that this company of butchers have any *power of regulation* over the members of their own company. Here, nothing is suggested, but the *diminution* of the *company of butchers*, and the danger of *their falling into decay*: and the *increase* of their *profits* is the only view of the bye-law. So that this is *not* a bye-law made for the common benefit of the *corporation*: the other companies are injured. (He here mentioned Sir *Thomas Raym.* 446. *Taverner's case.*) And no general grievance appears to have happened, to have occasioned the making of this bye-law.

Therefore he concluded, that it was, upon the whole, a *bad* one.

Mr. *Eyre, contra*, for the return, argued that this was a *good* bye-law.

First—It is *within the jurisdiction* of the makers of it.

Secondly—The *cause* of making it is a *sufficient* one.

First—It does *not exceed their jurisdiction*.

First, it does *not vary* any *essential* point of their constitution: it is only a *regulation*.

Every man intitled to the freedom of the particular company may be admitted to the freedom of the city, *as easily* as before. The right remains, *in substance*, as it was before: it is only *regulated*. Therefore it is not like the case of *Rex v. Philips*.

* N. B. Warrington's case being here cited from 8 Mod. 267. The court treated that book with the consent of [1327] tempt it deserves; and they all agreed that the case was wrong stated there: (I mean the old edition of that book.)

4 Co. 77. b. the case of corporations, proves that this is not varying the constitution.

1762.

Secondly, it is not injurious to the other companies. It only reduces them to their original institution.

REX
V.

Thirdly, it is not an unlawful restraint of trade in general, or of the privileges of particular persons. It does not exceed the custom.

HARRISON.

No additional expence appears upon this return. On the contrary, there is a provision against it.

The statute of 5, 6 W. & M. c. 10. § 6. makes nothing against us.

Nor is 1 Ro. Abr. 364. pl. 5. applicable to this case.

The customs of London are subject to a reasonable control by the corporation: and this is a reasonable control.

As to the second general objection.—This bye-law is agreeable to all the requisites. And the cause of making it is a sufficient and political one: it is to preserve the company of butchers from falling to decay and being destroyed; and it will be attended with public benefit. It classes butchers by trade, in the particular company to which they belong: and the natural tendency of it is to regulate that company.

[1328]

The case of *Wannell* against the Chamberlain of London was a solemn opinion, in a case similar to the present. And in which the case of *Groscourt* was considered and over-ruled. (b)

The reasons of making this bye-law are not confined to these particular and specifical ones which are mentioned in the preamble of it.

Mr. *Yates*, instead of replying, conceded, that if the case of *Wannell* was to be considered as an authority in point; and if the only objection in that case arose from a circumstance which does not exist in this; it would be useless for him to pretend to reply.

Lord MANSFIELD—It seems, that case was so. * It was determined in

Michaelmas term, 1725, 12 G. 1. when the resolution of the court was delivered by Sir Robert Raymond, then Lord Chief Justice. It had been twice argued. The first argument was in Lord Chief Justice Pratt's time; who held the bye-law to be reasonable, in respect of its tending to prevent frauds; and said "that the only difficulty was whether Wannell had a right to demand his freedom in the joiner's company;" having served a master who was not free of the joiners but of the merchant taylors. But the court, after hearing a second argument, and taking time to advise, held "that a mandamus would lie to the joiners' company, to admit him." My note of this case of Wannell, is agreeable to Sir John Strange's Report; it was upon a mandamus directed to Sir George Ludlam, then chamberlain of London

(b) In the report of *Wannell's* case in *Str.* 675. it does not appear that the case was over-ruled; but the answer given by counsel was, "that that case was adjudged on the foot of a dancing-master not being a trader."

1762.

REX

v.

HARRISON.

And the end of this bye-law is to *reduce* the matter to what must have been the *original* institution.

This is a *regulation* of a very *extensive* trade, that concerns every body who eats in the city of *London*.

It is not necessary that *all* the reasons of the bye-law should be given in the *preamble* of it.

Mr. Justice DENISON—The case of *Wannell* was determined to the satisfaction of every body at that time : and I took the point to be thereby *settled*.

And this is *not an alteration* of the constitution ; but *agreeable to* and a *true exposition* of the *original* custom.

This case is as different from that of *Rex v. Philips*, as light and darkness. That bye-law put the right of being *elected* into another set of men than the constitution required : whereas they could not alter the right to be elected. But this is *only regulating* the trade to what is most right and reasonable, and *restoring* it to the *true meaning* of the custom.

I am extremely satisfied with the resolution of the case of *Wannell*.

I think this a very *good* bye-law : and the objections are of no weight.

Mr. Justice FOSTER concurred in opinion, that this bye-law only *restored the constitution* to what it originally must have been and ought to be ; and that it was right and reasonable, and must have been the meaning of the custom, “ that each company should have the inspection of their *own* members.”

[Str. 676.
Hard. 55.]

Mr. Justice WILMOT quite concurred also. He said, the only doubt in *Wannell's* case turned upon the power of the joiners company to *refuse admitting* the man : but when that was gotten over, there was no more doubt.

Corporations were originally instituted for the regulation of trade : and every company must have had and ought to have the inspection and regulation of their own trade. It must be understood, *reddendo singula singulis*.

Therefore he was very clear, that this was *no innovation* or *alteration* of the constitution, but a *restoration* of it to its true and original institution.

Per Cur. (clearly and unanimously)

Let the RETURN be ALLOWED.

Tuesday, 29th
June, 1762.

REX versus PLUNKET, Esq.

An attachment for a contempt, costs were granted.

AN ATTACHMENT had been granted against Mr. *Plunket*, upon the application of Sir *Thomas Frederick* (the plaintiff in an action brought by him against Mr. *Lookup*) for Mr. *Plunket's* not appearing to give evidence, in obedience to a *subpœna* regularly served upon him.

Mr. Plunket swore upon his examination, " that Sir Thomas had undertaken to give him FURTHER NOTICE, if it should be necessary for him to attend ; but that Sir Thomas neglected to do it." And he swore, " that he had been subpoenaed on a former intended trial of the same cause and had then attended ; but the said intended trial did not come on." He further swore, " that he would have attended, if he had received such further notice from Sir Thomas, to do so."

1762.
R E X
V.
HARRISON.
[1330]

Whereupon I reported " that he had cleared himself of the contempt." And it appeared to the court, that the complaint against him was groundless and unreasonable, and must have been known to the prosecutor himself to be so.

THE COURT, after declaring it to be contrary to their general course and practice, to give costs to persons who had purged themselves of contempts upon their examination, in consequence of attachments which had been granted against them by the court, on cause shewn ; yet thought that it ought to be done in this particular instance ; because the prosecutor must, within his own knowledge, be satisfied that this complaint was ill-founded and vexatious.

Therefore they ordered that Sir Thomas should pay costs to Mr. Plunket.

R E X versus INHABITANTS of STOCKLAND.

See this case abridged in the table ; and at large in the quarto edition of my SETTLEMENT CASES, No. 163. page 508.

R E X versus HARRIS et al.'

MR. Stowe and Mr. Selwyn shewed cause against the following rule, which had been made on the motion of Mr. Ashurst ; viz.

" Wednesday next after fifteen days from the Holy Trinity, in the second year of King George the third. CITY of Gloucester : UPON reading the affidavit of The King against Gabriel Harris and two others. is ordered that Tuesday next be given to the defendants, to shew cause why this cause should not be tried at the next assizes to be held in and for the county of Gloucester, by a JURY of the said county of Gloucester, instead of the city ; upon notice of the said rule to be given to the said defendants in the mean time."

The affidavit, upon which the rule was obtained, went no further than to swear generally, " that they verily believed

Wednes. 30th
June, 1762.
[S. C. 1 BL
373.]
The venue
in a criminal
information
will not be
changed but
on strong
grounds.

1762.

REX
v.HARRIS
et al.[See 1 Dum.
866.]

"that there could not be a fair and impartial trial had
"by a jury of the city of Gloucester;" without giving
any particular reasons or grounds for entertaining such
a belief.

The cause to be tried was an *information* against the
defendants (as aldermen of Gloucester) for a misdemeanor,
in refusing to admit several persons to their freedom of
the city; who demanded their admission, and were intitled
to it, and, in consequence of it, to vote at the then
approaching election of members of parliament for that
city: and whom the defendants did admit, *after* the
election was over; but would *not* admit them *till after*
the election, and *thereby* deprived them of their *right of*
voting at it.

The prosecutors had moved for this rule, on a suppo-
sition "that the *citizens* of the city *could not but* be under
"an *influence* or *prejudice* in this matter:" though there
was, in fact, a list returned up to the proper officer, of
above six hundred persons duly qualified to serve on
the jury.

The cause now shewn by Mr. *Stowe* and Mr. *Selwyn* on
the part of the defendants, against trying the matter by a
jury of the county at large, instead of a jury of the city,
was, that this was an application both unprecedented and
ill-founded. For that, as this information was a *criminal*
proceeding, it was *local* and must be tried by a jury of
the county where the *fact* arose: and if that were not so,
yet here is no kind of reason shewn for going out of the
ordinary course, but *mere unsupported imagination*.

In the case of the Mayor of *Poole* v. *Bennet*, in 2 Sir
J. S. 874. The action being laid in the county of the
town of *Poole*, for a duty claimed to be due to the corpo-
ration; and it appearing manifestly, that there could be
no fair trial in *Poole*; the venue was indeed changed to the
county of *Hants*. But that was a *civil* action.

In the case of the *King* against *Clendon*, in 2 Sir J. S.
911. An information was laid for an assault in *Middlesex*:
and the court *refused* to amend it, by laying it in
London.

Rex v. *Burton* et al', Tr. 1754, 27, 28 G. 2. B. R. was
an *information* for a false return to a *mandamus*, laid in
the town of *Nottingham*; and the court *refused* to change
the venue from the town to the county of *Nottingham*, or
to any other county, (though it was sworn there was not
a sufficient number of freeholders in the town, who were
not burgesses:) because it was a *criminal* proceeding,
and the cause ought to be tried where the *facts* arose.
And yet that information *might* have been originally laid
in *Middlesex*.

[S. C. and P.
Saver, 116
15 Vin.
213, 215. and
see Folk. 374.
pl. 16:
Bull. 199, 200.
Say. 16 S. C.
1332
but not S. P.
12 Mod. 408.
Str. 727.
8 Co. 1.]

The case of *Norwich, Clift's Entr.* 741. Pl. 2. was a civil action.

There is a vast difference between *civil* and *criminal* proceedings. In the *latter*, the court will not grant a rule to inspect books : it was refused last *Hilary* term, in the cases of *Rex v. Head*, and *Rex v. Heydon*, and in *Dr. Purcell's* case in *Hil.* 1748.

Mr. *Ashurst*, supported by Mr. Splicitor General and Mr. *Morton*, argued on behalf of the prosecutors, for making the rule absolute.

They denied that there was any distinction, in *this* respect, between *civil* and *criminal* proceedings. An indictment may be removed by *certiorari*, out of a county where a fair trial can not be had, to be tried in one where it may. And they urged, that here must be a *failure of justice*, if it was not done: for, here are no persons in the city of *Gloucester*, who are impartial and unprejudiced. The affidavit, "that it is *verily believed* that an impartial "and fair trial can not be had by a jury of the city," stands uncontradicted; and must, therefore, be taken for fact and truth. (*d*)

Burton's case was an application by the prosecutor, to change the *venue*, in an information for a false return to a *mandamus*; and the refusing to change the *venue* did not occasion a failure of justice *there*; because the prosecutor of the *mandamus* might bring his *action* for a false return. Whereas *here* must be a failure of justice: which shall never be suffered. The case of the mayor of *Poole* against *Bennet* was determined upon this principle. And the case of *Norwich* also went upon this ground.

The present case is almost in point (they said) with that of *Norwich*: and there was the same suggestion as they now make.

Therefore they concluded with praying to have their rule made absolute; and that they might have liberty to enter a suggestion on the record, (as was done in that case,) "that there can not be a fair and impartial trial had "in the county of the city;" and therefore prayed that the *venire* may be directed to the sheriff of the county of *Gloucester*, to return a jury out of the county at large. (*V. Clift's Entries*, p. 741. Title, *Venire Facias*, pl. 2. *Calum-*

1762.

REX
V.
HARRIS
et al.'

[S. C. Sayer's
Rep. 146.]

(*d*) Qu. For in that case, according to a MS. note of it, an action could not have been supported, because no person or persons in particular, was or were interested: for it was a *mandamus* to the corporation of *Nottingham*, to proceed to an election for six burgesses to fill up a vacancy of that number in the common council, therefore an action would not lie. See also *Salk.* 374. Pl. 16.

1762.

.REX
v.HARRIS
et al.'

[1 Vent. 365.]

nia Juratorum Civitatis Norwici.) So, in the *Berwick* causes, a suggestion was entered on the roll. (See it in the preceding volume, page 863.)

LORD MANSFIELD—No two things can be more different than *changing* the *venue*, and *continuing* it as it was, with such a suggestion on the roll as is now proposed. In the *Nottingham* case, *Rex v. Burton et al'*, the motion was, “to *change* the *venue* :” this is, “to enter a “*suggestion* on the roll, with a *nient dedire*.”

Notwithstanding the locality of some sorts of actions, or of informations for misdemeanors, IF the matter can not be tried at all, or can not be fairly and impartially tried in the *proper* county, it shall be tried in the *next adjoining* county. The case of *Berwick* was determined upon the foundation—“That the writ of *venire facias* did “not run there.” And so it is likewise in the cinque ports. In *these* cases, there could otherwise be no trial had at all. That of *Norwich* was a case where, in respect of the particular circumstances, there could not be a fair and impartial trial had by a jury of that city.

But, as the party can not traverse such a suggestion, when entered by a rule of court, there must be a *clear and solid foundation* for it.

Now, in the present case, this *general* swearing to *apprehension and belief only*, is *not a sufficient ground* for entering such a suggestion; especially, as it is sworn on the *other* side, “that there is a list returned up, consisting of “above six hundred persons *duly qualified* to serve.”

Surely a person may espouse the interest of one or another candidate at an election, without thinking himself obliged to justify, or being even inclined to defend, the *improper* behaviour of the friends or agents of such candidate.

THIS question to be *now* tried, is no general question of right, or a general question that can affect the corporation *in future*, or by way of *example* : it is only, “whether “the present defendants, who were *not* the candidates, “acted partially and unjustly, upon an occasion and in a “matter where *THEY alone* are *personally* concerned ;” and it is a mere *personal* charge upon them.

So that here is a *want* of *foundation in fact*, for such a suggestion; and therefore there is no reason for the court's granting what is now prayed.

[1334] Mr. Justice DENISON—The court will be cautious of admitting the entry of a suggestion which cannot afterwards be contradicted.

It is true, that where an impartial trial *can not* be had in the proper county, the *venire* may be awarded to the *next* county. In a *Norwich* case, relating to a bridge, the

city of *Norwich* and the county at large being *both interested*, the *venire* was therefore awarded into *Suffolk*.

But there ought to be the *clearest evidence* in the world, to ground such a suggestion upon ; or it must arise out of the record itself.

Now here it does *not* arise out of the record ; *nor* is there a sufficient ground to support it.

The case of the *King* against *Burton* and others, in *Nottingham*, was a motion to *change* the *venue*. In this method of entering a *suggestion* upon the roll, the *venue* remains ; and the court only award the *venire* to the next adjoining county : but they ought *not* to do it in *this* case ; because the place of trial ought not to be altered from that which is settled and established by the common law, *unless* there shall appear a clear and plain reason for it ; which can not be said to be the present case.

Mr. Justice FOSTER was of the same opinion.

Here is no *fact suggested*, to warrant the conclusion “ that there can not be a fair and impartial trial had by “ a jury of the *city of Gloucester*.” It is a conclusion *without premises*. The *reason given*, or rather the *supposition*, would hold as well, in all cases of *riots at elections*.

This is no question relating to the *interest of the voters* : it is only, “ whether the defendants, the persons particularly charged with this misdemeanor, have *personally* “ acted corruptly or not.”

Mr. Justice WILMOT concurred.

There was no rule better established, he said, than, “ that “ all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed.” And therefore that rule ought never to be infringed, *unless* it plainly appears that a fair and impartial trial can not be had in that county.

Where that does *plainly appear*, he said he had no doubt of the court's having *power* to depart from the general rule.

The case of the *King* against the inhabitants of the county of *Nottingham*, in 2 *Lev.* 112. was a question upon the right of repairing a bridge. There the information brought against them for not repairing it was tried at the bar, by a *Middlesex* jury. That was done by *consent* : and it was a sort of *civil* right that was to be tried. However, if it be considered as a criminal case, *all the inhabitants* of the county were interested. [1335]

The true rule about suggestions entered upon the record, is “ that the *facts proving* that a fair and impartial trial can not be had in the ordinary course, must “ be *themselves suggested upon the record*.” Whereas, here, it is only a conclusion *without premises* ; it is only *supposed, conjectured*, “ they verily believe,” that there

1762.

REX

V.

HARRIS

et al.

1762.
 REX
 V.
 HARRIS
 et al.'

can not be a fair and impartial trial by a jury of the city. Nor, in the *nature of the thing*, can such a suggestion be *credited*. It does not follow, that because a man *voted* on one side or on the other, he would therefore *perjure* himself, to favour that party when sworn upon a jury. God forbid! the freemen of this corporation are not at all interested in the *personal* conduct of these men upon *this* occasion; the same reasoning would just as well include all cases of *election-riots*.

Therefore, though he had no doubt, he said, of the *authority* and *jurisdiction* of the court, to award the *venire* into another county, upon a suggestion of facts clearly and fully proved to the court, shewing "that a fair and impartial trial can not be had in the county where the fact is laid:" yet he was as clear, that in *this* case there was *no sort of foundation* for such a suggestion being entered.

Per Cur'—unanimously.

RULE DISCHARGED.

V. Dean and Chapter of Gloucester versus Pitt et al.
Trin. 1767.

REX versus PITT.

REX versus MEAD.

[5. C. 1 Black.
 380.]

Sentence on
 conviction of
 bribery.

THE defendants having been convicted of BRIBERY *at an election for members of parliament*, upon an information granted by the court, as at *common law*; the court had a doubt about the *sentence* they should pronounce upon them.

[1336] It was argued on *Friday* last, (a) (the 25th of this instant June) by Sir Fletcher Norton, Solicitor-general, Mr. Morton, and Mr. Thurlow for the defendants; and by Mr. Serjeant Dary, Mr. Serjeant Burland, and Mr. Popham, for the prosecutor.

The *counsel* for the defendants argued, that this court had no jurisdiction at *common law*, to punish bribery at elections to parliament. There is *no instance* of any such judgment given by *this* court: which proves that there can be none given by *them*.

The *House of Commons* (b) are the proper judges of this

(a) Vide 1 H.H.P.C. 171. 2 Hawk. 210, 211. 2 Atk. 672. 4 Doug. 288, 289. 6 Durn. 630, and *post.* 1359, 1423, 1586.

(b) There is another precedent there cited, to the same point; and see 2 Doug. 402. that the case of *Thomas Long*, as cited in 4 Inst. 23. is warranted by the journals of the house.

matter. 4 Inst. 23. *Thomas Long's case*, of *Westbury*, was adjudged in the House of Commons, *secundum legem et consuetudinem parliamenti*: and the mayor was fined and imprisoned; and *Long* removed.

LORD MANSFIELD—That was for a *contempt*; in which case the House of Commons had jurisdiction. The latter part can not be true: there could be no *fine* set *there*; it must have been in the Star-chamber.

The counsel for the defendants proceeded.

If this court can give any judgment *at all*, it can be no more than a judgment "*quod convictus est*;" As the two years limited by the * statute are not yet expired. For, * 2 G. 2. c. 24. otherwise, the party might be liable to a *double* punishment for the same offence: since any common informer may still bring an action, being within the time limited; and the offender will after judgment be liable to the penalty of five hundred pounds, and also to the disabilities mentioned in the † statute.

In *Rex v. † Luckup*, 2 Sir J. S. 1048. upon the gaming act, the judgment was only "*ideo convictus est*:" and that was after argument and consideration. (c)

Here, indeed, the action may be brought for the penalty of five hundred pounds, without such a judgment.

The court may therefore, in the present case, either give this judgment "*quod convictus est*;" or *postpone* and *suspend* the giving *any* judgment, till after the expiration of the limited time.

At least, the punishment ought to be greatly mitigated, in case the court should now give any judgment at all.

The counsel *pro rege* said the statute of 2 G. 2. c. 24.

1762.

REX

V.

PITT

and

MEAD.

† V. 2 G.
c. 24. s. 7.
and s. ult.

‡ His name
was Lookup
and his coat
of arms is an
eye in base,
looking up-
wards.

(c) Winning by *fraudulent* gaming was an offence at common law; and by 9 Ann. c. 14. s. 5. every person winning by fraud above 10l. at one time, or one sitting, being thereof convicted, upon indictment or information, shall forfeit five times the value of the money so won, and be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; the penalty to be recovered by any one who will sue for the same. Now in the above case of the *King v. Luckup*, it appears from a MS. note of that case, that it was holden after great argument and consideration, that the court could not set any fine on a person convicted on an *information* for the above offence; and though that *statute* is penned very particularly, which prevents this determination from being in point on the present case, yet the reasons, or some of them, for that determination, apply to this case.

1762.
 REX
 v.
 PITT
 and
 MEAD.

does *not* take away the offence at common law: it only inflicts a * new further penalty. Therefore the court may now inflict the *common law* punishment: the legislature have only inflicted an *additional* one. The punishments inflicted by this act are *cumulative*. *Queen v. Wigg*, *Salk.* 460. *Hawk. P. C.* 178. And they cited 2 *Hule's Hist. P. C.* 191. to prove that the party may still be indicted at common law. But they made a doubt whether an action could be brought upon the *statute* after a judgment given against the defendant at common law.

This is now to be considered in the same manner as if it were a conviction upon an *indictment*: for, whether the court had thought proper to grant an *information* or not, yet the same conviction might have been obtained upon an *indictment*. However, it appears by the words of the statute itself, ("or being *any otherwise* lawfully convicted thereof,") that an *information* might properly be granted *within* the limited time of two years.

Lord Coke in 2 *Inst.* 200. (upon *W. 1. c. 20. de Malefactoribus in Parcis*,) says, it is a maxim in the common law, "that a statute made in the affirmative, without any negative expressed or implied, does *not* take away the common law."

Lucas 336. The King against Dixon and his wife, an indictment for keeping a gaming-house, is in point. That was laid "*contra formam statuti*," and was brought *within* the time limited by the statute for bringing the action for the penalty.

In 6 *Mod.* 42. *Regina v. Orbell*—There is no such objection: and yet it appears by the record, that the indictment was brought *within* the limited time.

In *Rex v. Wolston*, *Fitz. Gibb.* 68. (for blasphemy,) the above-mentioned maxim was laid down. So in *Rex v. Robinson*, *Tr.* 1759. 32, 33 *G. 2. B. R.* Yet there the parish might have proceeded for the allowance. (*V. ante* p. 799.)

The act of 2 *G. 2. c. 25.* does not take away the common law proceeding for perjury.

Though the reasons urged might be an objection against actually punishing them a *second* time, yet the *mere apprehension* of a second punishment is no reason against punishing them *once*.

In 2 *Shower*, 30—*Rex v. Stanton*, judgment was given for the king upon the information, though an action lay for the party.

[1338] And very few prosecutions are commenced at common law, for the facts punishable by such acts of parliament as this is.

The counsel for the defendants replied, that though a prosecutor may have an ELECTION of one of two remedies,

yet that does not at all tend towards proving "that he shall have *both*." It is contrary to the law of this country; it is contrary to natural justice, that the party should be *twice* punished for the *same* offence. And this judgment now prayed against the defendants, would be *no bar* to an action in a civil suit.

"*Ideo convictus est*" is the *proper* judgment. The disabilities will follow it: and the party will remain open to an action for the penalty. The judgment ought to be *general*: the disabilities only follow as a *consequence*.

This case differs from the cases that have been cited; and is not at all like cases of a person being liable to both *civil* actions and *criminal* prosecutions for the same matter: for, they are *diverso intuitu*; whereas these are *both* of them *penal*.

THE COURT directed the inquiry, "whether, *since* the act of parliament, the *propriety* of granting informations *before* the time limited for bringing an action upon the statute was expired, had been *solemnly considered*."

Upon examination, it came out "that *no objection* had *ever* been made upon the ground of the *penalties* introduced by the act: where the affidavits were full, the rules had been made of course."

LORD MANSFIELD now delivered the resolution of the court.

He premised, that wherever a practice, which is wrong or unreasonable, has happened to have been introduced, for want of a sufficient advertence to the consequence of it, the best way is to set it right immediately, as soon as the inconvenience is observed, if former cases be not affected by the retrospect.

BRIBERY at elections for members of parliament must undoubtedly, he said, have always been a CRIME at common law; and, consequently, *punishable* by indictment or information. But the act of 2 G. 2. c. 24. has introduced a *very severe penalty*; in order to enforce the laws then already in being, and because they had *not* been sufficient to prevent the evil. It enacts in the seventh section,—

"That if any person, claiming a right to vote, shall ask, receive, or take any money or other reward, or agree or contract for any, either to give his vote or to forbear voting, in any such election; or if any person, by himself or any one employed by him, shall by any gift or reward, or by any promise, agreement, or security, for any gift or reward, corrupt or procure any person or persons to give his or their vote or votes in any such election; such person so offending shall for every such offence forfeit five hundred pounds (to be recovered as before directed,) together with full costs of

1762.

REX

V.

PITT

and

MEAD.

[1939]

1762.

REX

v.

PITT

and

MEAD.

"suit; and after judgment obtained against him in any such action of debt, bill, plaint, or information, or summary action, or prosecution, or being ANY OTHERWISE LAWFULLY CONVICTED THEREOF, shall for ever be disabled to vote in any election to parliament, and also to hold any office or franchise as a member of any city, borough, town-corporate or cinque port, as if naturally dead." And the last clause limits the prosecution to be *within two years*.

It is true, that some informations at common law have, since the commencement of this act, been applied for and granted *within* the two years. But it now appears, upon looking into the matter, that the granting such informations at the suit of a prosecutor, *subsequent* to the making of this act of parliament, was a point *never litigated or argued, or particularly considered*: it probably was thought warranted by *Spinage's* case, in the borough of *Abingdon*; * which, very likely, was apprehended to be a *precedent for it*; though, in fact, it was *not* a precedent for granting *these* informations for bribery at elections of *members to serve in parliament*; being, as it appears now it comes to be looked into, *only* for bribery at the election of a *mayor of the corporation*. In such informations as are carried on by private prosecutors, the *costs* stand upon a very different foot from the costs given to those who sue upon *this* statute: this act gives the person who recovers the penalty, *full costs* of suit.

This crime certainly still *remains* a crime at *common law*. The legislature never meant to *take away* the common law crime; but to *add* a penal action.

This appears by the words, "or being *any otherwise lawfully convicted* thereof:" and we are all of us clear, "that it *still remains* a *crime at common law*." And the present conviction, upon an *information granted by the court*, is just the same as if the defendants had been convicted upon *indictment*.

[1340] But this case has raised a great doubt in our minds, upon the *propriety* of granting informations *within* the two years.

The shewing cause, and the trial, *may* be auxiliary to the penal action. *After conviction*, the court is under a great difficulty "*what punishment* to inflict;" not knowing whether the penal action may follow, or not.

As at present advised, we all think, that *in general*, the court never ought to interpose by information.

After judgment for the penalty, they certainly would not interpose, to grant a *second* prosecution in an extraordinary way, by information.

By parity of reason, it ought not to be granted while the person is *liable* to such judgment.

* P. 1754.
27 G. 3. B. R.

If there is evidence to *convict*, there is evidence to support the *action* of a common informer.

There *may* possibly be *particular cases*, founded on particular reasons, where it may be right to grant informations, *before* the limited time for commencing the prosecution is expired: but the present case is not one of them. And these court now considers the two defendants as *remaining still liable* to the forfeiture and disabilities directed by the act of 2 G. 2. as the time limited for commencing prosecutions upon it is *not yet expired*: and therefore in adjusting the punishment which ought at present to be inflicted upon them, they do *not* consider it as a punishment *adequate to their offence*; but as an *additional* punishment, *over and above* the punishments inflicted by the act of parliament; to which statute punishments they *still* remain liable.

Therefore, since both of them have *already* suffered imprisonment for some time, they only order that

PITT be imprisoned for six months longer;
and

MEAD, for three months longer.

V. post. 1359, 1369, and *Rex v. Smith, esq.* and *Rex v. Brand Hollis, esq. Pasch. and Trin. 1776, 16 G. 3.*

1762.

REX

V.

HARRIS,
et al.

[Str. 823.

2 Show. 30.

2 Atk. 672.]

The End of Trinity Term, 1762, 2 G. 2.

1541.

MICHAELMAS TERM,

3 GEO. III. B. R. 1762.

Friday, 12th Nov. 1762. GOVERNOR and COMPANY for smelting down Lead, &c.
versus RICHARDSON, Esq. and others.

[S.C. 181.389.]

Lead-mines are
not chargeable
to the poor.

THIS was an action of trespass, for taking goods by way of distress; tried in *Cumberland*: and a verdict for the plaintiffs, subject to the opinion of the court upon a case reserved: the state of which, was long; but the QUESTION contains all that is necessary to be reported.

It was, "Whether the plaintiffs, lessees of certain LEAD-MINES in the parish of *Aldstone* in the county of *Cumberland*, rendering as rent a certain part of the lead-ore gotten thereout, were liable, in respect of the said lead-mines, to be rated to the relief of the POOR." (a)

This case was first argued, on *Tuesday*, 15th *June* 1762; by Mr. *Clayton* for the plaintiffs, and Mr. *Yates* for the defendants.

Mr. *Clayton*, on behalf of the plaintiffs, argued that they were not liable to be rated, upon the facts stated in this case.

They are not within 43 *Eliz. c. 2.* which, in naming

(a) A lessee under the crown of cope and lot, made an under-lease, reserving a certain rent, the lessor is liable to be assessed to the poor for this rent; for the poor's rate is a rate, not on the estate, but on the person in respect of the estate; and the reason why the lessor is not in ordinary cases liable to be rated, is because the tenant is rated: and therefore the landlord is excused, because otherwise the same land would be twice charged; but in this case the tenant is not rateable, 3 *Burr.* 1341. and therefore there is no reason why this sort of property should be excused, 17th of *May*, 16. *G. 3. B. R.* adjudged at a special case stated at *Darby* saizes, *Rowle v. Gill*, *Comp.* 451.

the persons rateable; mentions occupiers of *coal-mines*, 1762.
but avoids the mention of any *other* sort of mines.

Lead, tin, or copper-mines are wholly fluctuating and uncertain as to profit or loss: they may happen to produce no profit at all to the *adventurer*: nay, they are very frequently *detrimental* to those who hire and work them. And it is not stated, that *these* lead-mines produced any profit to the *lessees*: though they did to the *lessors*. And therefore lead, tin and copper-mines pay to the *land-tax*, which is a charge upon the *landlord*; whereas the poor-tax is a charge upon the *lessee*, who may be a loser, instead of a gainer. But the reason why lead, tin and copper-mines pay even to the *land-tax* is because they are *expressly* mentioned and specified in the *land-tax* acts.

Lead-mines have *never been used* to be taxed. They are not taxed in the counties of *York*, *Durham*, *Northumberland*, *Cumberland*, and *Derby*, nor in *North Wales*; nor the tin-mines in *Cornwall*. And these recent instances in 1757 and 1758, and 1760 and 1761, are of no sort of weight.

The expence of these mines may exceed the profits: and the profits are, at best, uncertain, casual and precarious; and as much so, as the heriots and other casual profits of a manor; which were determined not to be rateable to this tax, in *Rex v. Vandewall*, P. 33 G. 2. B. R. (V. ante, p. 991.)

Mr. *Yates*, *contra*, for the defendants, argued that the occupiers of *lead-mines* are *LIABLE* to this rent.

They are equally within the reason and meaning of 43 Eliz. c. 2. as *coal-mines* are, and that act only names *coal-mines* by way of *instance* or *example*; but intends to take in *all* other mines also. So, when executors only are specified in an act of parliament, it shall nevertheless include administrators; and where the warden of the *Fleet* only is particularly named, yet it shall be extended to all gaolers.

The *land-tax* acts speak of mines in general; and the act of 17 G. 2. c. 37. (relating to improved wastes and drained marsh-lands) after reciting the words of 43 Eliz. (which are "occupiers of *coal-mines*,") repeats them in the enacting part by the general term "MINES."

COAL-mines are as uncertain and precarious, as *other* mines; and yet they are specifically made liable. Even *stiles* are fluctuating in their value.

If any of these are rated, at times when they are not profitable, the proper remedy is by way of *appeal*.

These mines may bring in an immense profit; and they certainly introduce many poor into the parish.

PROFITS OF MANORS are not *annual* profits; no more

1762.
LEAD
COMPANY
V.
RICHARD-
SON.

are the profits of *timber*, but profits of a *market* are rateable to the poor. *Dutton, cap. 78. p. 213.* So are all things that yield a yearly revenue.

Mr. *Clayton*, in reply, enforced what he had before urged; and observed as to 17 G. 2. c. 37. that it refers to 43 *Eliz.* And therefore the general word "*mines*" must be understood only of *such* mines as are *therein* specified, viz. *coal-mines*.

THE COURT and COUNSEL agreed that it must be determined upon the general question; "whether lead-mines are rateable to the relief of the poor."

LORD MANSFIELD said that this was a very extensive and general question, with regard to the property of many persons in the kingdom: and would have it argued again; and he wished that the *fact* of rating even coal-mines might be inquired into. If they be not always rated, it must arise from some other reason than the construction of the act of parliament.

Mr. Just. WILMOT mentioned an act of parliament made in the same reign (31 *Eliz. c. 7.*) where the legislature speaks of "*any* mineral works, coal-mines, quarries, &c."

Uterius Concilium.

N. B. The certificates, procured subsequent to the foregoing argument, tended, in general, to shew "that it was *not* the usage, to tax lead-mines"

LORD MANSFIELD now, upon a second argument, stated the question (for the observation of the bar) to be this:—"Whether the plaintiffs, who are *lessees* of LEAD-mines within the parish of *Aldstone*, who pay NO RENT, but only a CERTAIN PART of the ORE raised, are liable, in respect thereof, to be rated to the relief of the poor."

Mr. Solicitor General (Sir *Fletcher Norton*) for the plaintiffs, at present, only stated the case.

Mr. *Morton*, *contra*, for the defendants, (the justices and parish officers,) insisted that the *uncertainty* of the profit to the landlord made no difference as to the *lessee*.

He argued that lead-mines were rateable; and urged, that coal-mines were only mentioned by way of example, in 43d *Eliz.*

[1344] The case of *Rex v. Vanderall* is not at all, he said, applicable to this case: that case went upon another *person* having been *already* rated for the casual profits; and not upon the *uncertainty* of the profits. Here, the same fund was taxed twice.

The surface of the ground is lessened in value, by the

1345-1346

Michaelmas Term, 5 Geo. 3.

1762.
LEAD
COMPANY
V.
RICHARD-
SON.

and the finder is obliged to pay certain proportions to the owner of the land.

Therefore it is reasonable that *lead-mines* should not be put upon the same foot with *coal-mines*: because there is so much greater risque in the search after them; even so much, that a man may be ruined by it, instead of succeeding.

The legislature have not, in this statute, mentioned *lead-mines*, but only *coal-mines*: and *expressio unius est exclusio alterius*. There is no reason to think they meant to include them.

Therefore this case is not within the words or meaning of that act. And I think this is confirmed by the act of 31 *Eliz. c. 7.* against the erecting and maintaining of cottages; which excepts * "cottages for the habitation of workmen and labourers in *any* mineral works, "coal-mines, quarries, &c." So that when they had it in contemplation, they specified them particularly.

Therefore I am clear that this act of 43 *Eliz. c. 2.* does not extend to *lead-mines*.

Per +Cur'.

Let the *postea* be delivered to the PLAINTIFFS.

+ Mr. J. Foster
was absent.

Tuesday, 16th
Nov. 1762.

BIRD versus RANDALL.

[S. C. 1 Bl. Rep.
373, 387.]

No action lies
for seducing
a servant
from his mas-

[1346]

ter, who has
been paid the
stipulated pe-
nalties for
leaving him.

[See Vin. Tit.
Bar. (B. 2.)

2 Bosanq. (9.)]

THIS was a case reserved at *nisi prius* at Guildhall, upon a trial before Lord Mansfield, in an action upon the case, wherein a verdict was given for the plaintiff, and twenty pounds damages assessed: but subject to the opinion of the court, upon a case stated.

The substance of the case stated was shortly this.

The plaintiff Bird and one Mary Hogg were silk-dressers, and partners in trade. And articles of agreement were entered into between the plaintiff Bird and one Burford, dated 25th of August 1760; whereby Burford covenanted with Bird, to serve the plaintiff Bird and the said Mary Hogg and the survivor of them, as a journeyman in their said trade and business of silk-dressers, for five years from the date; and to work at the usual and accustomed hours daily, and not to discover the mysteries of the trade, or the secrets of the plaintiff and his said partner: and Bird covenanted to pay Burford, weekly, twenty shillings a week for his work, And for the true performance of all and every the covenants and agreements contained in the articles, each party bound himself to the other in the PENALTY of one hundred pounds.

The case then goes on, and states that Burford accordingly entered into the said service, under the said

See per Lord
Mansfield 99
78.

articles; and that he continued therein until the 19th of September 1761: when the defendant, knowing of the said articles, *persuaded, procured, and ENTICED him to depart from and out of it*; and he accordingly did so: and never returned again into it. 1762.
BIRD
v.
RANDALL.

It further states that the plaintiff *Bird*, in *Trinity* vacation 1761, and *before* the commencement of the present action against *Randall*, brought an action of DEBT against *Burford* for the *penalty* of one hundred pounds for his departing out of the said service; and obtained a verdict and judgment against him in the said action, and recovered the said money, with costs: but the said monies (the debt and costs) so recovered were not *actually paid* to him by the said *Burford*, till the 29th of March 1762; which was *AFTER* the commencement of the present action, but *before* it came on to be tried.

The present action, (which is an action of *trespass upon the case*;) is brought by the SAME PLAINTIFF *Bird*, against the present defendant *RANDALL*, for the *ENTICING and SEDUCING the said Burford out of the plaintiff's service*.

The question was, "whether the *present* action be "maintainable or not, under the circumstances of this "case."

It was first argued on *Tuesday*, 22d of *June* 1762, by Mr. *Stowe*, for the plaintiff, and Mr. *Ashhurst*, for the defendant; and again, on *Friday* the 12th of this month of *November* 1762, by Sir *Fletcher Norton*, Solicitor General, for the plaintiff, and Mr. *Morison* for the defendant. [1347]

Upon the first argument, the court did not declare any opinion; but only threw out some doubts, by way of breaking the case; and desired to hear it argued again.

Mr. Solicitor General—The question is, whether the plaintiff, who has already recovered the penalty against the *servant*, can bring this action against the *seducer*.

He agreed, "that if the plaintiff had once received a full, satisfaction for the *same* thing, he could not recover a second." And also, "that a recovery of a penalty upon a deed is a full bar to an action to be brought upon that deed." But he said, it must be allowed to him that the party, to whom the deed is made, may bring either covenant or debt, at his election; and that a jury, in an action of *covenant*, even upon such a deed where there is a penalty, are not confined to give damages *within* the penalty, but may go *beyond* it. [Vin. Tit. Bar. (B.)]

He repeated his concession, "that a person who has once recovered a full and complete satisfaction from one man, shall not recover it again against another for the

1762.

BIRD.

v.

RANDALL.

On the following day, Saturday 13th November, Mr. Solicitor General proceeded to reply.

He agreed, that *as between* the master and the servant, the plaintiff has received satisfaction from the servant: and he supposed (though he knew no case to prove it) the master could not proceed further against him upon the covenant at large, after having elected to take the *penalty*. But this is no satisfaction for the wrong done to the master by RANDALL.

As to the case of *Coke v. Jennor*—A satisfaction was received, and a release was given to the joint-trespasser, for the *very same* trespass.

But, in the present case, there was *no actual* satisfaction really received, at the *time* when this action was brought: and the *mere recovery* is *not*, alone and of itself, a bar.

This case essentially differs from all those cases where the *same thing* has been recovered; which is the case of joint torts and joint contracts. *There*, it is the *same* individual injury; the *very same* thing, for which the damages are recovered: therefore the plaintiff ought not to recover twice, though he proceeded by different species of actions. *Here*, it is the *seduction* itself that is the *gist* of the action; and not the *consequence* of the seduction.

[*Ante*, 1348.] The damage arises out of the *nature* of the action. The nature of the case *implies* a damage; though perhaps none can be proved, or even though the servant was a very bad one. The consequential damages may be *more* or *less*, according to the circumstances of the case: but *some* damages there *must* be, however small.

As to Mr. Morton's objection, "that, upon the principles above laid down on the part of the plaintiff, the plaintiff might receive *several* satisfactions from several persons who might employ the servant during the "unexpired term."—The answer is, *future* employers of the servant would *not* be liable; because they would *not* take him out of the *plaintiff's* service, but out of *another person's*. But *this* defendant seduced him out of the plaintiff's actual service.

As to the cases cited from *Hutton* and *Cro. Eliz.*—He did not deny the principle and doctrine of them; but they are not applicable, he said, to the present case.

[1351] Suppose the master had *forgiven* the servant, or accepted a *private* voluntary satisfaction from him; yet he might have brought an action against the *seducer*; and that satisfaction received from the servant could not have been pleaded in bar; nor could it have been given in evidence *in bar* of such action against the *seducer*.

Here was a *good* cause of action, at the *time* when the action was brought: for, the plaintiff had *not then* re-

ceived ~~any thing~~ from the servant: and the mere recovery could not be given in evidence upon the general issue.

The court took time to consider, till this day. And now

Lord MANSFIELD delivered the resolution of the court.

He previously observed, that it does not appear upon the case stated, that the plaintiff was under any difficulty of receiving the money recovered from *Burford*.

This case turned, he said, upon two points; 1st. Whether the plaintiff could have maintained this action against the defendant for seducing his servant, if the 100l. penalty before recovered by him against the servant himself had been actually received by him BEFORE the commencement of the present action against the seducer: 2dly. If it could not, then whether his having received it SUBSEQUENT to the commencement of the present action, be such a circumstance as will vary the case, so as to intitle him to maintain his action, which he could not have maintained, if the actual receipt had been prior to the commencement of it.

In the first place, therefore, he would consider the nature of these articles, and of all other articles with penalties annexed to the breach of them.

In every case of articles with a PENALTY, the party injured may, if he chooses it, have an EQUITABLE relief, so often and so far as he suffers injury: (b) he may recover partial damages upon partial breaches, proportionable to the respective injuries done him, as often as the injuries are repeated; he may do this, *toties quoties*. So, in the present case, the master might have done, if the servant had left his service several different times, for a short space of time (as a week, or a fortnight or month) at each departure; and had, every time returned again to his service; he might, upon this equitable remedy, have recovered partial damages against the servant, for each breach of his contract, in proportion to its degree, but not beyond it: and for civil injuries, a man ought not, in point of justice, to recover more than in proportion to what he has actually suffered.

Besides this equitable relief, there is, in these cases, a further election given to the party injured, "to proceed by the *minimum* jus; and by a rigorous remedy, for the PENALTY," which is intended in *terrorem*, and by way of punishment for breaking the contract; which rigorous remedy may be taken for a very slight breach,

1762.

BIRD

v.

HARDLEY

[See 4 Burr.
2228. 11 Vin. 8:
3 Wils. 454.
2 Durn. 388.
Doug. 93.]

[1359]

(b) Lord Raym. 814. acc. Gilb. Rep. 114.

1762.

BIRD
v.

RANDALL.

and includes the idea of *more* than the damage actually sustained, certainly not of less.

But this *rigorous* remedy *can not be repeated*: for, the PENALTY extends to the uttermost farthing that can ever be recovered for *all* and *every* of the breaches; and when the party injured has once got *all* that he could be entitled to have for *every* breach, there is an *end* of the articles, and consequently of all further remedy upon them.

It was candidly agreed, at *Guildhall*, by the counsel on the part of the plaintiff, "that after the penalty had been so recovered against the servant, the *servant himself* was totally at liberty to go into what service he pleased." And so also was the *master* at liberty and quite freed from the articles, with respect to the servant: for, there was a total end of the contract, as between *them two*.

Then how will the case stand as to the *seducer*? it is *actual injury* done to the master, that gives him the action against the seducer: a bare *attempt* to seduce; without any damage following upon it, would not be an injury to the master; and consequently, would be no ground upon which he could maintain an action.

Here is *no injury at all* done to the master: for, he has recovered and received a *complete* satisfaction and *more*. Therefore all the injury is done away, and is as if it never existed.

A PENALTY, in the very term, includes *more* than the real damages actually suffered. And if the seducer or second master, who employs the servant after the servant has paid the penalty, were to be liable to damages in an action brought by the first master for so doing, this would finally *fall upon the servant*, and in effect be an ADDITION to the penalty: for, the second master will pay the servant for his service no more than he estimates it to be worth *to him*: and if he must pay a sum of money (20*l.* for instance) to the first master, for damages for entertaining his servant, he will make his bargain with the servant in *such* manner as to pay him so much the *less*.

Therefore there is no colour for the plaintiff to maintain his action upon this *first* point, *viz.* upon supposition of his having *actually received the penalty of the servant*, before the commencement of his action against the second master, as the seducer of his servant.

2d Point—But taking it, as this case was, "that he had not actually received it of the servant till after the com-

"commencement of the present action;" let us see whether this circumstance will vary the case.

Several arguments were drawn by the counsel for the defendant, from cases of joint-trespassers and joint-contractors, which were urged as being applicable to the present question. But they were sufficiently answered by Mr. Solicitor General.

There, the recovery is against them all, for the same thing; and there is no analogy, at all, between those cases and this. In those cases, there is a recovery of the self-same thing for a joint injury: the defendants are all of them liable to the plaintiff, and he may proceed against any, or all of them, if he pleases; as it is but one trespass, one contract, and all are liable. Yet he shall have but one satisfaction from them all.

Another essential difference between those cases upon torts and actions upon the case, is, that those are actions *stricti juris*; and therefore such a former recovery, release or satisfaction can not be given in evidence, but must be pleaded: but an action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore such a former recovery, release or satisfaction need not be pleaded, but may be given in evidence. For whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only.

Whether he could have recovered in an action commenced against the present defendant, after having recovered the penalty from the servant, but without having actually received the money so recovered from the servant, I will not now determine: I should have doubted of it, extremely.

But here, the penalty recovered by him from the servant was actually received by him before the present action came on to be tried; without any sort of difficulty. He might have received it, when he would: but he chooses to lie by, till he has brought his action against a third person who would not have been liable to any thing, if the plaintiff had received the money of the servant in due time; and then receives it of the first defendant, and afterwards proceeds in this action to recover it against the second defendant; which is against conscience. Therefore in such an action as this is, (an action of equity, not a former action *stricti juris*;) it is enough if it appears upon the evidence that the plaintiff ought, not in conscience to recover it.

If he had actually recovered it, through the defendant's not knowing "that the penalty had been paid," an action

1769.

SIBB

V.

RANDAL.

see Starky

[vide post.]

1354.

1 Vern. 343, 4.

2 Wils. 331.

332.

2 Hurr. 1008.

2 Vin. 11.

pl. 37.

Sider. 45.]

[1354]

[Bull. 310]

1762.

BIRD

V.

RANDALL.

*V. Moses v.

Macfarlan,

19th May,

1760. V. ante,

p. 1005.

would lie against him, for money had and received: like the * case out of the court of conscience, not long since determined in this court.

As the plaintiff has *already received*, from the servant, more than *ample satisfaction* for the injury done him, he can not *afterwards proceed* against any other person for a further satisfaction.

And my brother Denison suggests to me, that the court would upon the application of the present defendant, by way of motion, have stayed the plaintiff's proceeding further against him upon the defendant's shewing them "that the plaintiff had actually received the money recovered by him in his former action against the servant."

Per Cur'.

Let the *postea* be delivered to the DEFENDANT.

PRICE versus NEAL.

The same

16th Nov.

1762.

[S. C. 1 Bl.

390.]

An innocent indorsee cannot be compelled to refund the

[1355]

money paid to him on a forged acceptance.

32p
60.

Received upon
in Jones v. Hyde
London 488.
3 B 2p 432.

THIS was a special case reserved at the sittings at Guildhall after Trinity term 1762, before Lord Mansfield.

It was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neale was indebted to him in 80l. for money had and received to his the plaintiff's use: and damages were laid to 100l. The general issue was pleaded; and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows—"Leicester, 22d November 1760. Sir, Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane Cannon-street, London;" indorsed "R. Ruding; Antony Topham, Hammond and Laroche. Received the contents, James Watson and son: witness Edward Neale."

That this bill was indorsed to the defendant for a VALUABLE CONSIDERATION; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of 40l. and take up the said bill: which was done accordingly.

That another bill was drawn as follows—"Leicester, 1st February 1761. Sir, Six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, Sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-lane, Cannon-street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and son. Witness for

"Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "*accepted John Price*;" and that the plaintiff wrote on the back of it—"Messieurs Freame and Barclay, pray pay forty pounds for John Price."

1762.
PRICE
v
NEAL.

That this bill being so accepted was indorsed to the defendant for a VALUABLE consideration, and left at his bankers for payment; and was paid by order of the plaintiff, and taken up.

Both these bills were FORGED by one Lee, who has been since hanged for forgery.

The defendant Neale acted INNOCENTLY and BONA FIDE, without the least privity or suspicion of the said forgeries or of either of them; and paid the WHOLE value of those bills.

The jury found a verdict for the plaintiff; and assessed damages 50l. and costs 40s. subject to the opinion of the court upon this question—

"Whether the plaintiff, under the circumstances of the case, (a) can recover back, from the defendant, the money he paid on the said bills, or either of them."

Mr. Stowe, for the plaintiff, argued that he ought to recover back the money, in this action; as it was paid by him by MISTAKE only, on supposition "that these were true genuine bills;" and as he could never recover it against the drawer, because in fact no drawer exists; nor against the forger, because he is hanged.

1356]

He owned that in a case at Guild-hall, of *Jenys v. Fowler* [S. C. Str. 946. acc. and qu. Str. 648.] et al', (an action by an indorsee of a bill of exchange brought against the acceptor,) Lord Raymond would not admit the defendants to prove it a forged bill, by calling persons acquainted with the hand of the drawer, to swear "that they believed it not to be so;" and he even strongly inclined, "that actual proof of forgery would not excuse the defendants against their own acceptance, which had given the bill a credit to the indorsee."

But he urged, that in the case now before the court, the forgery of the bill does not rest in belief and opinion only; but has been actually proved, and the forger executed for it.

Thus it stands even upon the accepted bill. But the plaintiff's case is much stronger upon the other bill which was not accepted. It is not stated "that that bill was accepted it before it was negotiated;" on the contrary, the consideration for it was paid by the defendant, before the plaintiff had seen it. So that the defendant took it upon

(a) See 12 Mod. 494. Str. 648. Salk. 344. Carth. 357. Str. 1154. 2 P. Wms. 76. Doug. 618. Plowd. 166. 1 H. Bl. 690. 4 Durn. 325.

1762. the credit of the *indorsers*, not upon the credit of the *plaintiff*; and therefore the reason, upon which Lord Raymond grounds his inclination to be of opinion "that actual proof of forgery would be no excuse," will not hold here.

PRICE
V.
NEAL.

Mr. Yates, for the defendant, argued that the plaintiff was not intitled to recover back this money from the defendant.

He denied it to be a payment by *mistake*: and insisted that it was rather owing to the *negligence* of the plaintiff; who should have inquired and satisfied himself "whether the bill was really drawn upon him by Sutton, or not." Here is *no fraud* in the defendant; who is stated "to have acted *innocently* and *bonâ fide*, without the least privity or suspicion of the forgery; and to have paid the whole value for the bills."

Lord MANSFIELD stopt him from going on; saying that this was one of those cases that could never be made plainer by argument.

[1357] It is an action upon the case, for money had and received to the plaintiff's use. In *which* action, the plaintiff can not recover the money, unless it be *against conscience* in the defendant, to *retain* it: and great *liberality* is always allowed, in *this sort of action*.

But it can never be thought *unconscientious* in the defendant, to *retain* this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had *bonâ fide* paid, without the least privity or *suspicion* of any forgery.

Here was *no fraud*: *no wrong*. It was incumbent upon the *plaintiff*, to be satisfied "that the bill drawn upon him *was the drawer's hand*," before he accepted or paid it: but it was not incumbent upon the *defendant*, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him: and he sends his servant to pay it and take it up. The other bill, he actually *accepts*; after which acceptance, the defendant *innocently* and *bonâ fide* discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and *then* found out "that they were forged:" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the *second bill*, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, *bonâ fide*. It is a misfortune which has happened without the *defendant's* fault or neglect. (If there was *no neglect* in the plaintiff, yet there is no reason to throw off the loss from one *innocent* man upon another *innocent* man: but, in

This case, if there was *any* fault or negligence in any one, it certainly was in the *plaintiff*, and *not* in the *defendant*.

Per Cur'.

RULE—That the *postea* be delivered to the DEFENDANT.

TROTT, *qui tam*, &c. *versus* WELCH.

THIS was an action of debt, brought by a custom-house officer, upon an act of parliament of 26 G. 2. c. 21. for a penalty of 200l. for having wrought silks found in his possession, unsealed.

This act of parliament was made for encouraging the silk-manufacture of this kingdom, and for securing the duties upon velvets, wrought silks, &c. The first section directs all velvets, wrought silks, &c. to be *sealed*. The third section enacts, that if any be found *unsealed*, they shall be *forfeited*, and may be *seized* by any officer of the customs: and shall, *after condemnation*, be publicly sold to the best bidder; and one moiety of the produce shall be to the use of his majesty, and the other moiety to the officer who shall seize the same; and the *person in whose possession* the goods so seized are found, shall for every such offence *forfeit* 200l. The sixth section directs, that all *pecuniary penalties* imposed by this act, shall be *sued for*, in any court of record at *Westminster*, or in the court of *Exchequer* at *Edinburgh*, respectively, by action, &c. in the name of his majesty's attorney general, or of his majesty's advocate in *Scotland*, or in the name of *some officer of the customs*: and one moiety of every such penalty shall be to his majesty, and the other moiety to the *officer of the customs* who shall inform and prosecute. Then comes a *PROVISO*, in the seventh section, "that if any officer of the customs shall *neglect or refuse*, for the space of *one month*, to *PROSECUTE TO EFFECT* any person or persons for any *pecuniary penalty* or *forfeiture* by this act inflicted upon offenders against the same, then it shall be lawful for any person or persons whomsoever to sue for, prosecute; and recover the respective *pecuniary penalties* and *forfeitures* by this act inflicted, in like manner as is therein before directed with regard to the officers of the customs: and one moiety of the said respective *forfeitures*, when recovered, shall, in such case, go and be applied to the use of his majesty, his heirs and successors; and the other moiety, to the person or persons who shall sue or prosecute for the same respectively."

The defendant in the present action pleaded a *RECOVERY* of the *same penalty*, in a *former action* brought against him for it, by *another person*; and *payment* of it to that

VOL. III.

I

1762.

PRICE

V.

NEAL.

Tuesday, 23d
Nov. 1762.

S. C. 1 Bl.
392.]

[1358]
Limitation of
qui tam actions on
contraband goods
must be after
condemnation.

1762.
TROT
V.
WELCH.

other person pursuant to the said recovery : and he sets forth the particulars of the said recovery. He also stated, in his plea, the act of parliament abovementioned ; and alleges " that the custom-house officer did not bring " his action within a month *after* the SEIZURE : " whereupon, the other person brought *his* action, and recovered, as aforesaid.

[1359] The plaintiff in the present action (*replies, protestando* that the judgment pleaded by the defendant was obtained by fraud,) " that he, the now plaintiff, *did*, within one " month *after* the CONDEMNATION of the goods seized, " bring his action against the defendant, and prosecuted " it to effect : " and he alleges, that the seizure was made on the 2d of May ; that his information in the *Exchequer* was filed on the 22d of May ; and that the condemnation was on the 3d of November.

To this replication the defendant demurred : and the plaintiff joined in demurrer.

Mr. *Walker*, for the defendant, argued that the custom-house officer ought to have brought his action within the space of one month from the SEIZURE of the goods. The prosecution for the *pecuniary* penalty is *not* tied up to the time of the condemnation : the limitation refers to the time of the seizure.

Mr. *Yates, contra*, for the plaintiff, argued that the meaning of the act of parliament is, " that if the custom-house officer shall neglect or refuse, for a month after " the condemnation, it may then be lawful for any other " person to do it." He has attached the interest in himself, *by exhibiting the information*. He cannot be said to have neglected or refused to prosecute to effect : for, he has seized the goods ; he has proceeded *in rem*, (which attaches the right of action in him ;) and he now prosecutes for the *penalty*.

THE COURT were clearly and unanimously of opinion with Mr. *Yates*. They held that the custom-house officer had *used due diligence* ; and that the right of action attached in him, by his seizure, exhibiting an information, and *proceeding to condemnation* : and accordingly they gave an *unanimous*

JUDGMENT for the PLAINTIFF.

* Mr. Just.
Foster was not
present.

Wednes. 24th
Nov. 1762.
Sentence in
bribery at
elections.
* V. ante,
p. 1270, 1304.
[And 4 Doug.
288, 9, and
post. 1387.]

REX versus HEYDON.

THE defendant stood convicted of * *bribery* at an election for members to *parliament*.

And because the time limited for bringing the *qui tam* action will expire in *March* next, the matter was *adjourned* till the first day of next *Easter* term : and *Heydon* entered

into his *own* recognizance *only*, in one hundred pounds, (which was not at all opposed by the prosecutor's counsel,) to appear here again at that time. (a)

This was S. P. with *Rex v. Pitt*, and *Rex v. Mead*, ante pa. 1335. V. post. pa. 22d April 1763.

1762.

REX

v.

HEYDON.

HUNT *versus* COXE.

[1360]

Thursday,
25th Novemb.

1762.

[S. C. 1 Bl.
393.]

Sci fa. against

bail may be

sued out after

a ca. sa. re-

turned, though

not regularly

filed, and

short notice to

the bail is

immaterial.

[See 2 Durn.

757, 758.

1 East 87.

6 Durn. 285.]

THE COURT unanimously agreed, that it was right and necessary to adhere strictly to the established rules of the court relating to the time and manner of *bail's surrendering their principal*.

The two points chiefly disputed in the present case, were the *filing* the return of the *ca. sa.* against the principal; and the *actual* surrender of the principal *within* the limited time.

THE COURT considered the *ca. sa.* against the principal as little more than matter of form; and chiefly intended to intimate to the bail, in *what species of execution* the plaintiff determined to proceed: and as the *leaving* it in the sheriff's office was a notice to the bail, "that the plaintiff would proceed against the *person* of "the defendant," it was incumbent upon the bail to *search* "whether any *ca. sa.* was left in the office;" and that the court would not enter into an examination by affidavit, "whether the *ca. sa.* was actually returned, "or such return actually filed, *BEFORE* the issuing of the "*scire facias* against the bail;" and the rather, because if the bail had *pleaded* to the *scire facias*, "that no *ca. sa.* "was returned and filed *before* the teste of the *scire facias*," such return might have been filed at *ANY time before putting in a replication* to such plea.

As to the *time and manner of SURRENDERING*—they held that a surrender at about half an hour after eleven at night on the last day, (which was the last day of the term,) *without* an actual bringing the defendant into court, (which was then risen,) or before a judge (none being accessible at that late hour,) in order to have an *exoneretur* entered upon the bail-piece, was *not* sufficient; though it was so late at night as to render the doing this impracticable; and though the defendant was actually delivered to a judge's tip-staff, and even lodged in the *King's Bench* prison, that very night; which the bail swore was the utmost that *the very late notice* they received from the sheriff of the *ca. sa.* (which was returned "*scire feci*") gave opportunity to them to do.

(a) Qu. if an original could not have been filed and kept in secret.

1762.

HUNT

v.

COXE.

[1961]

Their RULE to shew cause why the proceedings against them should not be stayed, and an *exoneretur* entered on the bail-piece, &c. was DISCHARGED, with costs: for, the court would not meddle with the sufficiency of the time for surrendering the principal; because a *scire feci* had been *duly returned* by the proper officer.

Saturday, 9th
Nov. 1762.

WILSON *versus* DUCKET.

Not decided
what propor-
tion of a
premium
ought to be
returned
where a policy
is cancelled.

THIS was an action upon a policy of insurance on a ship; with a count of a general *indebitatus assumpsit* for money had and received to the plaintiff's use: and damages were laid at 98l.

The trial was had under a decree of the court of Chancery, where the now defendant, the insurer, being there complainant, had *offered* to pay back the premium, which was 10l.

No money was, in the present case, paid into court; though the usual course in these cases is for the defendant, the insurer, to bring the premium into court.

The jury found a verdict for the *plaintiff*, for the ten pounds PREMIUM, on the count for money had and received to his use; although they were of opinion against the *policy*, upon the foot of *fraud*; and found against it as being *fraudulent*. (In fact, the first underwriter was only a decoy-duck, to induce other persons to underwrite the policy: and it had been previously agreed between the insured and him, "that *he should not be bound* by his signing the policy;" which this court considered as a *fraud*, and therefore that the jury had given a *right* verdict in finding the policy *fraudulent*.)

By concurrence of Lord *Mansfield*, (before whom it was tried,) and of the counsel on both sides, it was agreed to bring this question before the court, "whether, upon a policy of insurance being found *fraudulent*, the PREMIUM should be *returned* to the plaintiff the insured, or *retained* by the defendant the insurer."

The method taken was by the defendant's counsel moving (on *Monday* the 22d instant) for a rule to shew cause why the judgment should not be entered up for the *defendant*; and the court's making a rule to shew cause.

Mr. *Harvey*, for the plaintiff, now shewed cause. He argued that this contract was to be looked upon as VOID AB INITIO. Therefore *no risque* was run by the defendant; and consequently, he had no right to retain the premium.

There is no case at *common law*, on this head, that has

been judicially determined. But in cases like this, equity and common law courts have concurrent jurisdiction; and must determine alike, upon like circumstances: and the two cases in equity, of * *Whittingham v. Thornborough*, and † *De Costa v. Scandret*, are nearly in point.

1762.

WILSON
v.

DUCKET.

* V. Precedents in Chan-

cery 30. Where a policy was decreed to be delivered up; and the premium to be repaid; the plaintiff's deducting thereout their costs. † The like decree- Policy to be delivered up, with costs: but the premium to be paid back, and allowed out of the costs.

Mr. *Morton* and Mr. *Yates*, for the defendant, mentioned a case of *Rucker v. Hollingbury* before the Master of the Rolls; who was of opinion contrary to Mr. *Harvey's* two cases.

But Lord MANSFIELD said that there must be some mistake, in reciting this last case before the Master of the Rolls: for, the practice of the court of CHANCERY is certainly agreeable to Mr. *Harvey's* cases. But what he wanted to know was, "whether there was any common-law determination to the same effect:" (which it did not appear that there was.)

Whereupon Lord MANSFIELD said, it was plain what must be done in this case: for, he looked upon the offer made by the complainant's bill in equity, to be the same thing as if the money had been actually brought into court, in the present case.

Therefore a rule was made, that the verdict found for the plaintiff be vacated; and that a verdict be entered for the defendant.

REX versus WILLIAM CLARKE.

Monday, 29th
Nov. 1762.

AN *habeas corpus* having issued, on Friday last, directed to Mr. *Clarke*, who was the keeper of a private mad-house at *Clapton*, commanding him to bring up the body of Mrs. *Anne Hunt*, who was kept confined in his house.

When it appears that the party is actually insane, the court will not direct the body to be brought up on an *hab. cor.*

Mr. Solicitor General now moved to return the writ; at the same time offering an affidavit from Dr. *Monro*, importing "that about nine months ago he was applied to by Mrs. *Threlkeld*, Mrs. *Hunt's* daughter, for his advice and assistance concerning Mrs. *Hunt*, as a person disordered in her senses; and that thereupon he recommended her to the care of the said *William Clarke*, who keeps a private mad-house, and is accustomed to have the care of such unfortunate persons; and that she is still in the custody of the said *William Clarke*, upon the same occasion:" and he further swears "that from the time of her being so placed under the care of the said *William Clarke*, to this time, the said *Anne*

[1363]

1762.
 REX
 v.
 CLARKE.

"*Hunt* hath appeared and is yet, in his judgment, a LUNATIC; and is now in *so disordered a state of mind*, that she is NOT FIT to be brought into this court." The affidavit adds, "that he is informed and verily believes that a commission of LUNACY will shortly be issued against the said *Anne Hunt*; and that the same hath been deferred on no other account but because of the late minority of *Anne Bowen*, the grand-daughter and one of the next akin of the said *Anne Hunt*; which said *Anne Bowen* is now come of age, as the doctor hath been informed and believes."

But Lord MANSFIELD proposed to put this matter into another method; viz. to use this affidavit of Dr. *Monro*'s as a reason for enlarging the time to return the writ, instead of actually filing the return at present.

Accordingly, Mr. Solicitor took back the writ and return: and

THE COURT enlarged the time for making the return till the next term, being perfectly well satisfied by the affidavit of Dr. *Monro*, that Mrs. *Hunt* was not in a condition fit to be taken out of the care and custody of those to whom her person was intrusted, and who were upon the point of obtaining a proper legal authority for what they were doing; which, however intended for her benefit and advantage, had not yet obtained that strict legal sanction which they were now in a regular pursuit of.

Mr. Serjeant *Whitaker*, who had moved for the *habeas corpus*, came afterwards into court, and desired a rule for liberty to have access to and inspection of Mrs. *Hunt*, in order to see that she was properly treated. But as he could not make out, that his application was made on behalf of any person who had the least pretension to demand this, the court rejected his request.

FISHER versus PRINCE.

2 March 902

A specific thing demanded in trover may be
 [1364]
 brought into court upon payment of costs.

UPON shewing cause by the plaintiff's counsel, "why, upon DELIVERING to the plaintiff the several goods and chattels for which this action (which was an action of TROVER) was brought, and paying him his costs to the day of making the motion, further proceedings should not be stayed;" (which rule to shew cause had been obtained upon a motion made by the counsel for the defendant;) it was urged, on the part of the plaintiff, that this is, in effect, a motion "to bring the goods into court;" and it was contrary to the course of the court, in actions of TROVER, to bring into court the thing demanded, (excepting the single case of trover for monies numbered;) and that the reason which has been often given for it is,

" that this court *do not keep a warehouse*:" and a case was hinted at, where a motion to bring in a * gold watch was denied.

1762.

FISHER

V.

PRINCE.

And the court denied it in the present case, and discharged the rule: but it was *not* upon that *general* principle that they denied it, but upon the *circumstances of the case*: such as the complicated quantity of the goods demanded, and the uncertainty of their remaining, of the same value as they were when taken; and some other like circumstances. For

* Harding v. Wilkin. H. 27 G. 2. B. R. [See Bull. 49. Salk. 557. Str. 142, 829, 1191.

7 Durn. 54.]

Lord MANSFIELD and Mr. Just. WILMOT both concurred in the following distinction, " that where " trover is brought for a *specific chattel*, of an ascertained " quantity and quality, and unattended with any circumstances that can enhance the damages above the real " value, but that its *real and ascertained value*, must be " the *sole measure* of the damages, there the specific thing " demanded *MAY be* brought into court; (and Mr. Just. " *Wilmot* said, this was the more reasonable as this action " of trover comes in the place of the old action of " detinue:) where there is an *uncertainty* either as to the " quantity or quality of the thing demanded, or that there " is any tort accompanying it that may enhance the " damages *above* the real value of the thing, and there is " no rule, whereby to *estimate* the additional value, there " it shall *not* be brought in." Lord Mansfield said, it is pity that a false conceit should, in judicature, be repeated as an argument: " the court does not keep a warehouse," what then? What has a warehouse to do with ordering the thing to be *delivered* to the plaintiff. Money paid into court is payment to the plaintiff. The *reason* and *spirit* of cases make law; not the *letter* of particular precedents. In trover for money numbered, or in a bagg, the court have ordered it to be brought in: yet the jury may give more in damages; they may allow interest, (and in some cases they ought.)

The *reason* holds to every other case, where a thing clearly remains of the *same value*; yet the jury may give damages for the *detention*. [1365]

I remember its being done twice or thrice, in things of small value. It ought to be done to prevent vexatious litigation: which a plaintiff may be tempted to pursue, when in all events he is sure of costs. It ought to be done, because it is the *specific* relief.

It ought to be done: because at the trial, when the thing remains in the same condition, there generally is a rule " to deliver it."

An *estimated* value is a precarious measure of justice, compared with the specific thing.

I am aware of the cases where a *laced head*, a *gold*

1762. watch, a diamond ring, and Chinese pictures were refused to be brought in,

FISHER

v.

PRINCE.

But, as I think "such motions ought neither to be refused or granted, *of course*," they must depend upon their own *circumstances*. No injury is done the plaintiff, if the court should think "he ought not to proceed for damages beyond the specific thing;" because he may still proceed for more, at the *peril of costs*; and so he ought.

But in *this* particular case, the goods are *altered*, and their *value changed*.

REX versus WHITEAR, et al.'

Sessions have no jurisdiction to make an original order for payment of the balance of overseers accounts.

MR. Serjeant Stanniford and Mr. Yates shewed cause why an order of SESSIONS should not be quashed. It was an order ORIGINALLY made at the *quarter-sessions* for the borough of *Portsmouth*; and purported to be an order made upon the appeal of the present overseers of the poor of the parish of *Portsmouth*, directing their predecessors, the *late* overseers, to pay over to the appellants, the *present* overseers, the balance of their accounts; which accounts were settled and balanced by the said order of SESSIONS.

[1366]

To this order, four exceptions had been taken: the first of which was a material one; the three others were slight, and not necessary to be here specified, because the court quashed the order upon the *first* objection, without taking any notice of the *rest*.

The first exception was to the JURISDICTION of the SESSIONS, to make an order upon late overseers to pay over monies to their successors, by way of *original* order, in the *first* instance; WITHOUT any *previous* application having been made to *two justices*, pursuant to the directions of 43 *Eliz. c. 2*.*

* V. § 4, and § 6.

It was urged, in support of this exception, that all subordinate jurisdictions must shew "that they have *jurisdiction* of the matter they take upon them to determine." But here has been *no previous application* to two justices, or any *appeal* to the sessions from any former order; and the sessions cannot take it up *per saltum*, nor have they any *original* jurisdiction. Therefore their jurisdiction fails.

[S. C. Bott. 61.]

All this was, fully and on mature deliberation, determined in the case of *Rex v. Bartlett*, et al. churchwardens and overseers of *Brackley St. Peters*, Tr. 7, 8 G. 2. B. R. †2 *Strange*, 983.

† N. B. Sir

J. S. gives only a short account of it, in a few lines; but it was argued and discussed several times, both at the bar and by the bench.

The answer given to this objection by the Serjeant and

Mr. *Yates* was, that the present order was not made upon the statute of 43 *Eliz.* (as that of *Rex v. Bartlett* was,) but upon 17 *G. 2. c. 38. § 4.* which gives an appeal to the next general or quarter sessions of the peace, "to any person or persons who shall find him, her, or themselves aggrieved by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein; or shall have any material objection to such account as† aforesaid: or any part thereof; or shall find him, her, or themselves aggrieved by ANY NEGLECT, act or thing done or OMITTED by the churchwardens and overseers of the poor, or by any of his majesty's justices of the peace."

1762.
 REX
 V.
 WHITEAR.

The reply made by Mr. Solicitor General (who had taken this exception) was, that the statute of 17 *G. 2. c. 38.* does not give power to apply to the sessions *per saltum*, to make such an order as this; but the *previous* application to two justices *remains as necessary*, as it was before.

[1367]

And of this opinion was THE COURT; who said that this act of 17 *G. 2.* made no alteration in this respect, but had quite another view.

ORDER of sessions quashed.

The End of Michaelmas Term, 1762. 3 G. 3.

MEMORANDUM—There was but one single case *determined* within this term, that seemed worthy of being reported; though some few cases were under the consideration of the court, which afterwards received their determination, and will follow in their course; particularly the cases of *Bidleston v. Whytel*, and *Glover v. Black*.

Saturday, 12th
Feb. 1763.

[S. C. 1 Bl.
400.]

Bankrupt's
executor
pleading a
false plea after
commission,
liable to costs.

[See 7 Vin.
131. Cooke's
B. L. 168, 9.]

HOWARD, Widow, and another, Executors, *versus*
JEMMET, Executor.

ON shewing cause against setting aside a *fieri facias*, and paying back to the defendant the monies levied thereon, it appeared that the defendant was a BANKRUPT, against whom a commission had issued, and who had afterwards obtained his CERTIFICATE; and that the present action was brought against him *as executor*, upon a bond entered into by the defendant's testator: and the defendant had, between the time of the issuing of the commission and the time of obtaining his certificate, pleaded a FALSE PLEA (*viz.* "that he had no assets," where in fact he had some assets in his hands,) which was found against him; and thereupon the plaintiffs had judgment *de bonis testatoris si, &c.* and against the defendant himself, *de bonis propriis*, for the costs.

Mr. Solicitor General, on behalf of the defendant, urged, that by virtue of the bankrupt act of 5 G. 2. c. 30. the defendant was *not liable* to the execution as to his *own proper* goods; because he had given up his *all under* the commission of bankruptcy, and stood DISCHARGED **[1369]** *by the certificate* against all demands which might have been made upon his estate and effects under the commission: and he alledged, that these costs having arisen from the necessity he was under of staying off the judgment, they were such a debt as might have been proved under the commission.

But *Per Cur'*—The pleading a false plea was his own act, and his own fault; and the judgment and execution *de bonis propriis*, for costs, was singly owing to this his *false plea*: which was subsequent to the issuing of the

commission. Consequently it could not have been proved under the commission; and therefore cannot be discharged by the certificate. 1762. HOWARD and another.

RULE DISCHARGED.

V.

V. 2 Sir J. S. 1196. *Grabam v. Benton.*

JEMMET.

Note

Per Lord MANSFIELD—If an *executor* becomes bankrupt, the commissioners can not seize the *specific* effects of his testator: not even in *money* which *specifically can be distinguished and ascertained* to belong to such testator, and not to the bankrupt himself. [See 4 Durn. 625, 629, 648. 1 Bos. 294.]

The End of *Hilary* Term, 1763. 3 G. 3.

1370-1371

EASTER TERM,

3 GEO. III. B. R. 1763.

BONAFOUS *versus* RYBOT.

Wednes. 20th
April, 1763.

Principal and
interest due
on a bond
payable by
instalments
may be paid
into court.

MR. *Eliab Harvey* and Mr. *Thurlow*, on the part of the plaintiff, shewed cause against a rule which had been obtained by the defendant in this action (which was debt on bond,) for the plaintiff to shew cause why it should not be referred to Mr. *Owens*, to compute *what is due* to the plaintiff, of the several **INSTALMENTS** stipulated by *articles of agreement* bearing date on or about the 26th day of *January* 1758, and made in *disfeizance of the bond* whereupon this action is brought; and why upon payment of what shall appear to be due, with interest for the **INSTALMENT unpaid**, together with the plaintiff's *costs* to be taxed by Mr. *Owens*; all *further proceedings* in this action should not be *stayed*.

[7 Durn. 124.]

This rule was obtained upon the act of parliament of 4, 5 *Ann. c. 26. § 13.* whereby it is enacted, "that if at any time, pending an action upon any ** such* bond with a penalty, the defendant shall bring into the court where the action shall be depending, **ALL the principal money and interest due** on such bond, and also all such *costs* as have been expended in any suit or suits in law or equity upon such bond; the said money so brought in shall be deemed and taken to be in *full satisfaction and discharge of the said bond*; and the court shall and may give judgment to *discharge* every such defendant of and from the *same* accordingly."

* This word
"such" refers
to the preced-
ing clause
which men-
tions "any
bond which
hath a condi-
tion or defea-
zance to make
void the same
upon payment
of a lesser
sum at a day
or place cer-
tain."

[1371]

The fact of the present case was, that the bond upon which this action was brought was a *bond* conditioned for payment of a *gross* sum of money *absolutely* at a day *certain* (in *April* 1759;) but no mention was *therein* made of paying the money by *instalments*; nor was that any part of the *original agreement*: which *original agreement* is dated the 13th of *January* 1758. But

Afterwards, on the 26th of *January* 1758, the parties came to a *subsequent agreement*, and entered into *articles*

dated on that day; by which articles it is agreed between the said plaintiff and defendant, "that the money shall be paid *by* **INSTALMENTS**:" four of which instalments were fixed to *Midsummer* 1759, *Midsummer* 1760, *Midsummer* 1761, and *Midsummer* 1762; and the last, at *Midsummer* 1769.

1763.
BONAFOUS
v.
RYBOT.

In these articles is contained a **DEFEAZANCE** to the bond of 13th *January* 1758, in case the sum mentioned in the condition thereof to be payable *in gross* at the certain day therein fixed, should be paid by instalments upon the particular specified in this defeazance: **PROVIDED** that the said sums agreed to be taken by instalments should be *punctually and regularly* paid by the defendant at and upon the *very days* specified in the defeazance for making the respective payments; and that the defendant should live till all the said days be past. Otherwise, this *defeazance was to be void*.

The defendant paid the two first payments at *Midsummer* 1759 and 1760, and part of the instalment due at *Midsummer* 1761; but totally *neglected* to pay that which became due at *Midsummer* 1762, or even any part of it. At *Michaelmas* 1762, (*subsequent* to the last mentioned instalment,) the defendant paid to the plaintiff, and the plaintiff received of him the *whole interest* then due upon the whole debt up to that time; including **INTEREST** for the sum payable at the *preceding Midsummer*, as well as for all the remaining money *not yet become payable*.

The plaintiff's counsel urged, in discharge of this rule—

1st. That the case of a *bond conditioned* for payment of money **BY INSTALMENTS** is *not within* this act of parliament. For, it is confined to *common and ordinary bonds* conditioned for payment of a lesser sum at a *day certain*; and does *not extend* to such as are conditioned or defeazanced upon payment of the money by *instalments*; at least, not till after *all* the days of payment are past: as is manifest by the direction "that the money brought in shall be taken to be in *full satisfaction of the bond*," and that the court shall give judgment to **DISCHARGE** "the defendant from the same;" which would destroy all the plaintiff's security for the *subsequent payments not yet become payable*. And they said, that they could find * *no case* where it had been holden to extend to bonds condi- [1372]
tioned for paying the money by *instalments*. V. 2 Str. 814.

2dly. That even admitting that a *bond conditioned* for paying money by instalments, or so defeazanced at the *time of executing* the bond, might be construed to be within the intention of the statute; yet it would by no means follow, that a case circumstanced as the present case is,

1763.
BONAFOUS
V.
RYBOT.

would be within it *likewise*: for, here the defeazance was not made nor thought of *at the time* when the bond was executed; but is a *distinct subsequent transaction*, at a *future time*, and in a *distinct deed* or instrument *executed long after* the bond.

3dly. That the court could not enter into this matter, without taking upon themselves to try a cause in equity, upon *affidavit only*, without bill, answer, interrogatory, or examination of witnesses; and to give an *equitable relief* to the defendant upon his *own affidavit only*, against a *legal right* actually *vested* in the plaintiff: for, the defeazance, which was in favour of the debtor, not being complied with, is become totally *void*, by the proviso contained in it; and the bond and penalty stand in full force *at law*; and the defendant has no claim to be relieved against the forfeiture; especially, considering the value of money at the time when the plaintiff ought to have received it. The defeazance being *void*, by the express terms of the proviso; all the agreements contained in it, relating to the paying the money by instalments, are quite out of the present case, as much as if no such defeazance had ever existed.

4thly. They asserted that if the court *were* at liberty to enter into the *equitable* circumstances of the case, they would appear to be strongly on their client the *plaintiff's* side.

Sir *Fletcher Norton*, solicitor general, and Mr. *Yates*, *contra*, for the defendant, maintained the contrary; and argued thus, in support of the rule.

1st. A bond conditioned or defeazanced for payment of the money by *instalments* is, after any of the days are *past, within the intention and purview* of this act: and they said that there have been * cases so determined; but did not specify any in particular.

* V. 2 Stra.
814, 957, 958.

[1378] 2dly. Its being upon a *separate* paper can make no difference, upon the equity of the statute: no more can its being *subsequent* to the execution of the bond.

3dly. The plaintiff has *waved* the forfeiture by *receiving interest* not only for the sums due at *Midsummer 1761*, and *Midsummer 1762*, but even quite *up to the following Michaelmas*.

4thly. The *equitable* circumstances of this case they alleged to be quite with the *defendant*, instead of being strongly on the side of the plaintiff.

Mr. Justice DENISON thought the case to be within the act; or, at least, that the proviso in the defeazance makes no difference: for, that proviso "that the defeazance should be void on failure of any of the payments by instalment," imports nothing more than

what would have been *implied* though it had not been inserted.

1763.

BONAFOUS
V.
RYBOT.

But Lord MANSFIELD said, that this proviso in the defeazance makes the *whole* money due upon failure of *any* of the payments by instalment: and it seemed to him, that the whole turned upon this.

This act of parliament reforms, in some instances, an *erroneous* course of proceeding in the courts of law and equity; which ought never to have prevailed; and which the *courts themselves might and ought* to have remedied, but did not. Therefore it should not only have the most *liberal* construction; but the courts ought to exercise their *own* authority, to *extend* the spirit and reason of this parliamentary interposition, "for the *easier, speedier* " and *better advancement of justice*," to cases *not mentioned* in the act. So Lord Hardwicke did. When a cause was set down to be heard upon a bill and answer, and the bill dismissed; the plaintiff, by the course of the court, only paid forty shillings costs. The act provides for the case of the plaintiff's dismissing his *own* bill, or its being dismissed *for want of prosecution*; but does not mention the case of dismissal on *hearing*: so that the plaintiff, by putting the defendant to *more* expence and vexation, avoided making reparation. This course continued, in Chancery till late in Lord Hardwicke's time; when he made an order to alter it.

It is surprisng, that after the statute of usuary, 37 H. S. * which excepts obligations with condition, *made* • c.9. upon a *just and true intent*, the courts of law did not consider the just intent of a *bond* to be principal, interest, and costs, secured by a penalty; and suffer the party, at *any* time, to save the forfeiture by *performing the intent*.

It is more extraordinary, that *after* this was settled in a court of *equity* " to be the nature of a bond," and therefore every party to a bond *understood* it in *this* sense; the courts of *law* did not follow equity, but still continued to do *injustice*, as of course; and put the parties to the delay and expence of setting it right *elsewhere*, as of course. [1374]

The act of parliament meant that in cases of penalties by way of *security*, the clear final justice of the case should be attained in the courts of *law*: (much to the benefit of both parties.)

I cannot see a doubt, upon *bonds conditioned* for payment of money by *instalments*: and I am glad to hear that it has been so determined. *

* See 2 Stra.
814. Bridges

v. Williamson, 3 G. 2. and in *Maine v. Somner*, Hil. 1790. 4 G. 2. in this court in a like case, where the first day only past, it was moved by Mr. Pilsworth, and opposed by Mr. Filmer: and the court after some hesitation granted it.

1763.

BONAFONT

v.

RYBOT.

[Eq. Abr 28.

ca. 9.

7 Vin. 47 pl. 3.

2 Vent. 352.]

The defeazance being dated at a *subsequent time*, and written on a distinct and *separate paper* from the bond, makes no difference.

Bnt what makes the difference, is this. The bond here is conditioned for payment of a *gross sum*, then due, to be paid at a certain *fixed day*. Then there is a subsequent agreement made in favour of the debtor, easing him of that stipulated single payment *at that fixed day*, and allowing him to pay it by *instalments*; PROVIDED that he pay it *punctually* on the days agreed upon; and that he live till they shall be all past: otherwise this agreement and defeazance to be void. And consequently, as the debtor has *not* paid the money *punctually*, they are void, and the *gross sum* is due to the obligee.

[2 Black. 432.

3 Vern. 134,

289, 316.

15 Vin. 452,

453.]

There is a distinction in the court of Chancery, "that if five *per cent.* be reserved for interest on a mortgage, with a *condition*, to *accept four if punctually paid*; this condition must be strictly performed; and the debtor shall *not* have relief in equity after the day of payment is elapsed, (because the one *per cent.* was to be abated upon a *condition* which is *not performed*: but if four *per cent.* be reserved, with an *agreement* that if the four be not punctually paid at the day, the mortgagee shall pay five, *that* shall be considered as a *penalty added*; and the court of equity *will*, in such case, relieve against it."

Now the present case is in effect, within the *former* part of this distinction; for it is a condition *unperformed*. Therefore the *debtor* cannot have relief in a court of equity, any more than he can have it at common law: but the creditor has a *right* to have recourse to his *bond*.

As to the *WAVER*—It could, at the most, be only a *constructive* one. But in reality, it is none at all: for, the *interest* (even upon the sums payable by instalment) is *part* of the *original debt* due upon and secured by the *bond*; and therefore the plaintiff was entitled to receive it as *part of the original debt*.

Unless the defendant pays the *whole* money, he cannot be relieved from the penalty. However *this* rule must *certainly* be discharged; there being *no ground* to make it absolute.

* Mr. Justice Foster was not present.

* Mr Justice WILMOT expressly concurred: and Mr. Justice DENISON said nothing further in opposition to it.

RULE DISCHARGED, with costs
(to be paid by the defendant to the plaintiff.)

MONCASTER *versus* WATSON, et al.

1763.

THIS was a case reserved from the northern circuit, in an action brought on 2, 3 E. 6. c. 13. by a *lay-impropriator* against the occupiers of lands in the parish of Felton, in the county of Northumberland; for taking away their corn and hay, *without* setting out the *tithe*, or agreeing for it. Friday, 22d April, 1763. [S. C. 1 Bl. 402.]

An exemption and *modus* not extending to former lands shall not exempt the allotted common. [See 5 East. 355. 7 Durn. 649, 651.]

The substance of the case stated was, That they claimed to be EXEMPT from paying *any tithe at all* for these lands upon the following foundation, *viz.*

That a private act of parliament was passed in the year 1753, (26 G. 2. c. 46,) "for dividing and inclosing the common called Felton Common, in the parish of Felton, in the county of Northumberland."

That the lands in question had been, till the said year 1753, (when the said common was so divided and inclosed,) PART of the said common, whereupon the commoners had used to have common for their cattle levant and couchant, &c.

That ninety acres, part of the said common, were, by the said act of parliament, allotted to the owner of *Swardland demesne*: under which said allotment, the defendants occupy the said ninety acres, formerly parcel of the common, but *now made parcel of Swardland demesne*.

That the act directs that the divided lands (before parcel of the common) shall be holden by each person to whom the respective divisions are allotted, subject to the *same* charges and incumbrances as *their own former lands* to which they are allotted and consolidated, were before subject: and it is declared in the act itself, (a) "that it be construed *beneficially* to the said land-owners to whom the respective divisions are allotted."

That the owners of *Swardland demesne* had *never paid tithe of corn, grain, or hay*; having been always exempt from the payment of tithe of *corn* and *grain*, in consideration of having always kept in repair the north end of *Felton church*; and being EXEMPT from the payment of tithe of *hay*, under a *modus*.

The question stated upon the case, (and the only question *then* intended to be brought before this court,) was—

(a) It is not so in the act, for the clause is thus: "be it further enacted by the authority aforesaid, that this act and every clause and matter therein shall by all and every judge and judges and other person and persons, be construed and adjudged as largely and beneficially in all courts of law and equity, and all other places as can be for the ends and purposes herein above mentioned."

VOL. III.

K

1763.
MONCAS-
TER
v.
WATSON.

" Whether the occupiers of these 90 acres, late *parcel of the common*, but now allotted to the owner of *Swardland demesne*, are or are not liable to the payment of tithe of corn and hay."

But the counsel, when they came to argue it, made two questions, viz.

1st. " Whether *Swardland demesne* was itself exempted, from the payment of tithe for corn : " (it was agreed to be exempt from tithe of hay, by the *modus*.)

2dly. " Whether the 90 acres of inclosed common be exempted from tithe of corn and hay."

However, THE COURT would not enter into the first question (" whether non-payment of tithes can be set up against a lay-impropriator, (b) as a presumption of title : " (c) because it was never intended by the parties, to be meddled with by the present action, must plainly.

As to the second question—

[1377] Mr. Wallace, who argued for the defendants, contended that as the allotment was to bear all the *burthens* of the ancient estate to which it was now annexed, it ought therefore to enjoy all the *privileges* of it : and as this ancient estate was exempt from tithes, so also ought the allotted ninety acres to be.

And he relied very much upon a case in the court of *Chancery*, determined by Lord Hardwicke on 15th July 1748; which he cited as in point : the name of it was *Stockwell v. Terry*. (d) *Stockwell* was rector of the parish,

(b) *Bunb.* 325, 345.

(c) *Vide Com.* 643. that presumption cannot. *Sed qu.* whether a presumption of title may not? In reason it ought.

(d) *S. C.* 2 *Bur. E. L.* 388. 1 *Vez.* 115. *Bunb.* 138. and see *Salk.* 169. *pl.* 1. and vide *Buller* 191. which shews it was determined on the same ground as that in *Bunb.* 138. The note on the case of *Stockwell v. Terry*, 14 July 1748, in *Buller's Nisi Prius*, page 178. was long before *Vezey's Reports* were published, and therefore cannot be supposed to be taken from that Report, but from a communication from Lord Bathurst, or atleast, from notes collected by him. The clause in *Buller's Nisi Prius*, ed. 1775. p. 191. is as follows, viz. " Lord Hardwicke held (stating a point not material to this case) " a note in the same cause; it appearing that a *modus* of 13l. was paid for the tithe of *Grange* farm, to which there was common appurtenant in the land inclosed, a parcel of which was allotted by the act for inclosing, to the farm : the chancellor held the *modus* extended to such inclosed land."

and filed his bill against the occupier of some land (then plowed up) for tithe of the corn which grew upon it. The defendant insisted upon a *modus* of 15s. in lieu of ALL tithes arising upon the GRANGE farm; and that the GRANGE farm had never paid any tithes. Then he shewed, that the land for which Stockwell demanded this tithe of corn by his bill, had been part of a *down* which had been inclosed by a private act of parliament, and had been thereby allotted to, and had ever since continued part of the GRANGE farm; and therefore ought to be exempt from all tithes, as well as the GRANGE farm itself. And Lord Hardwicke dismissed the rector's bill, so far as it related to this land which had been down-land, and was so allotted to the Grange farm.

1763.
MONCAS-
TER
v.
WATSON.

Mr. Thurlow, for the plaintiff, argued, that notwithstanding this decree in *Stockwell's* case, yet in the present case (which differs much from that) the allotted common is not exempted from the payment of tithes.

This demand of the impropiator, in the present case, is a claim of the tithe of corn, grain, and hay. But corn, grain, and hay could not be part of what grew on a common: the tithes that arose upon this common (appendant to *Swardland demesne*) could have been only tithes of agistment, or of lambs, calves, wool, milk and other things that could be the produce of a common.

Now a *modus* or other compensation must be in lieu of these specific tithes. This exemption therefore can not relate to any other tithes but such as could in their nature have arisen out of the common. So that it is not within the substantial idea of the *modus* or compensation insisted upon by way of exemption from paying tithe for these lands, which were part of the common, but now bear corn, grain and hay. For, the rector could have no benefit from this *modus*, which was confined to the tithe of corn, grain, and hay, in respect of any of that sort of tithe which could arise from the common, whilst it remained common. [1378]

TITHES are not issuing out of the land, but collateral to it: and they cannot be discharged but by special words; which this act does not make use of, the words of it being only general words. *Cro. Eliz.* 161. *Parkins v. Hinde*, 11 Co. 13. b. S. C. 1 Leon. 300. *Stile v. Miller*. Owen 39. S. C.

An exemption may be easily destroyed. An alteration of the use of the land will destroy it: as where a buck or a doe is to be paid out of a park (e) and the park is dis-

(e) This argument was used in 1 *Vez.* 116. but did not prevail.

1763.
MONCAS-
TER
v.
WATSON.

parked. For which, he cited *Hutton* 58. *Poole v. Reynold* (upon a prescription "to be discharged of all tithes, by "delivering deer annually:" and the park was afterwards disparked.)

Here the exemption claimed is, "to be discharged of "the tithe of corn, grain, and hay arising and growing on "Swardland demesne." But the common now inclosed and allotted was not, whilst it was common, capable of producing either corn, grain or hay. Therefore it is not exempt from tithe of corn, grain and hay.

[Same argu-
ment in 1 Vez.]

If a mill be discharged of tithe; and the owner turns the water-course but a very little way, and re-edifies his mill upon such turned water-course, this re-edified mill shall not be discharged. 1 Ro. Abr. 652. Title *Dismes*, Letter F. pl. 2.

So that changing the substance of the exemption is sufficient to destroy it; even supposing it to have been a good one.

LORD MANSFIELD—The case of *Stockwell v. Terry* differed very much from the present case. The *modus* insisted upon in that case extended to ALL kinds of tithes: whereas the exemption insisted upon in the present case is confined to the specific land called *Swardland Demesne*, and does not extend to the right of COMMON. Here is no equivalent at all for the tithes of agistment of wool, milk, lambs, or any other tithes of such a kind as could arise upon a common. The equivalent goes only to corn, grain and hay; the tithe whereof could not arise upon the common, whilst it remained a common.

[1379] In the case cited, the rector was, as owner of the glebe, a PARTY to the act of parliament: here, the impro-priator is not party to this act of parliament.(r) And there the *modus* covered the right of common: it was a *modus* of 15s. which was paid for the Grange farm, in lieu of all tithes arising upon it, "and of ALL the tithes "of all the cows and sheep belonging to that farm that "should be DEPASTURED ON THE SAID DOWN," (which was afterwards inclosed and allotted to it.) So that the *modus* covered not only the Grange farm itself with its appurtenances, but the common also: (which is not the present case.) Lord Hardwicke decreed, "that *modus* "should stand for the allotted lands, as well as for the "Grange farm and its appurtenances;" and accordingly, he dismissed the bill AS TO THOSE lands which the *MODUS*

(f) This is true, there is not a word mentioned about tithes in any part of the act; and this takes off one of the reasons given by Lord Hardwicke, for his opinion in *Stockwell v. Terry*, as appears 1 Vez. 118.

Covenanted: but as to all the *other* lands of the common, which had before used to pay tithe of wool, agistment and other small tithes, he decreed an account.

Here *all rights are saved*, generally, by this act of 26 G. 2. Consequently, the impropiator's right to tithes *remains*: and there is no need to shew *how* they are due, because they are due of common right.

THE WHOLE COURT were very clear(g) that in the present case, the exemption and *modus* did *not extend* to the waste and common; and therefore that the allotted lands, which had been part of that waste and common, having been subject to tithes *before* the allotment, must **REMAIN** *liable* to them after it: which they held to differ materially from the cited case, where the *modus* *did* extend to the waste and common.

They understood the words "subject to the *same charges and incumbrances* as their former lands were subject to,"(h) to mean only incumbrances upon the

1763.
MONCAS-
TER
V.
WATSON.

(g) This is contrary to what was before admitted, as appears in p. 1376. There is also another point mentioned towards the bottom of the same page; which, if determined one way, would have been a bar to the plaintiff: and the court would not enter into that question, "because it was never intended by the parties to be meddled with by the present action most plainly:" whereas, *the court ought to consider every point material, though omitted to be insisted on*, and yet with respect to the *modus* for hay, they determined against the admission of the parties.

(h) Even if there had been no such clause, yet by the rules of law and justice, the land allotted ought to be subject to the same charges, as the land in lieu of which it was allotted, *Pickering's Finch*. 67. *Reg.* 93.; therefore this clause ought to have been extended to all charges and incumbrances, and consequently to the repairs; and dower is particularly mentioned: so that it was absurd to say, the general words had reference to that; and if the lands allotted were subject to repairs, they could not be subject to tithes, as that would make them doubly charged with respect to tithes: as to all benefits and exemptions, as well as to all burdens, the lands allotted ought to be considered as the same as those "in lieu of which they were allotted;" and so is the rule in the statute. The clause in which is thus, "be it further enacted by the authority aforesaid, that the lands intended to be allotted and inclosed as aforesaid, shall after such allotments thereof respectively be

1763. *estate, (as dower, &c.) and not to intend its being subject to the repair of the church of Felton.*
 MONCAB- See the case of *Lambert v. Cumming*, 21
 TER November, 1723, in the *Exchequer*:
 V. *Bunbury* 138.
 WATSON.

Lord MANSFIELD said, that case was determined upon the same ground as Lord *Hardwicke's* decree went upon, *viz.* that what was *before exempted* shall remain exempted; and what was *not before exempted* shall pay tithe.

Per Cur. unanimously,
 Let the *postea* be delivered to the PLAINTIFF.

Thurs. 28th
 April, 1763.
 [S. C. 1 Black.
 300 353.]

Leave given
 to withdraw
 return to
 mandamus.

[1380]
 * V. ante,
 p. 1265, 23d
 Jan. 1762.

Tuesday, 3d
 May, 1763.

Administrator
 defendant
 may give evi-
 dence of re-
 tainer or
 plead it.

REX *versus* BARKER et al'.

UPON Mr. *Dunning's* motion, consented to by Mr. Solicitor General,

THE COURT gave leave to the defendants, to with- draw their * return to the *mandamus*: and a peremptory *mandamus* was by consent on both sides awarded; (the parties concerned having, since the last motion, gone to a new election.)

PEREMPTORY MANDAMUS
 (by consent on both sides.)

PLUMER, Spr. *versus* WILLIAM MARCHANT, ADMINIS- TRATOR OF PETER MARCHANT.

THIS was a case reserved from the *Sussex* assizes, hol- den before Mr. Serjeant *Wynne*.

An action of debt was brought, in *Michaelmas* term 1762, upon a *bond* of the defendant *William Marchant's* INTESTATE, in the penal sum of 200L.

The defendant, in *Hilary* term, 1763, *pleaded* PLENE ADMINISTRAVIT.

The plaintiff, in the same *Hilary* term, replied, " that " the defendant then had, and on the day of exhibiting " the bill *had sufficient goods and chattels, &c.* to have " satisfied to the plaintiff, the debt and damages afore- " said." And issue was joined *thereon*.

At the trial, the defendant's counsel offered to *give in*

[Vide Bull.
 141.]

" held and be enjoyed, by such person and persons re-
 " spectively, and in such course, order and manner;
 " and shall be subject to such jointures, dowers, estates,
 " portions, charges, and incumbrances respectively, as
 " the lands and hereditaments, in respect whereof such
 " allotments shall be made, ought to have been held and
 " enjoyed, and should have been subject to in case this
 " act had not been made."

enidsuoe, the following *covenant*, contained in the after-mentioned deed of settlement; *viz.*

By articles of agreement indented, dated 7th August 1759, made between *Peter Marchant* the elder of *Hurst-perpoint* in *Sussex*. gent. and the intestate, *Peter Marchant* the younger, nephew of the said *Peter Marchant* the elder, of the first part; *Mary Longhurst* of *Limester* in the said county, and *Sarah Longhurst* of the same place, spinster, daughter of the said *Mary Longhurst*, of the second part; and the defendant *William Marchant*, and *John Balcomb* of *Angmerring*, in the said county, of the third part; after provision being made (in consideration of an intended marriage between the said intestate *Peter Marchant*, and the said *Sarah Longhurst*, and the sum of 330*l.* and upwards, as a marriage portion,) by settlement and surrender of divers freehold and copyhold estates on the said *Sarah Longhurst* and the issue of the said intended marriage: it was witnessed as follows—

“ And the said *PETER MARCHANT the younger*, in consideration of the said marriage, and as a provision for the said *Sarah* his intended wife in case she shall happen to survive him, and for the issue of such intended marriage, doth for himself, his heirs, executors and administrators *covenant*, promise and agree, to and with the said *William Marchant* and *John Balcomb* their executors and administrators, that he the said *Peter Marchant* the younger shall and will in and by his last will and testament, or that his executors or administrators shall, within six months after his death, well and truly pay and deliver, either in money, goods, chattels or effects, out of his personal estate, the full sum of 700*l.* unto the said *William Marchant* (the defendant) and *John Balcomb* or the survivor of them, or to the executors or administrators of the survivor of them: and that the interest and produce of the same shall be advanced and paid to the said *Sarah*, for and during the term of her natural life, for the maintenance of herself, and for the maintenance and education of the children of such marriage: and after her decease, it is declared and agreed to be the intent and meaning of all the said parties to these presents, that the same shall be equally divided amongst the issue of such intended marriage, and to be paid to them respectively as they shall attain to the age or ages of twenty-one years or if any of them are daughters or daughter, to be paid respectively to such daughter or daughters at their respective ages of twenty-one years or day or days of marriage; and in default of such issue at or after the death of the said *Sarah Longhurst*, to be paid to such person or persons as he the said *Peter Marchant* the younger shall in and by his last will and

1763.

PLUMER
V.
MARCH-
ANT.

[1381]

1763.
PLUMER
V.
MARCH-
ANT.

"testament give, leave and bequeath the same. And for the better performance of the said covenant, article and agreement herein before-mentioned to be by him the said *Peter Marchant* the younger done, paid and performed, he the said *Peter Marchant the younger* doth hereby bind and oblige himself his heirs, executors and administrators, unto the said *William Marchant* (the defendant) and *John Balcomb* their executors and administrators in the penal sum of 1400l."

Which articles were sealed and delivered by the said *Peter Marchant* and the said *John Balcomb*.

The said marriage afterwards took effect: and the said *Peter Marchant* the husband died intestate, in November 1762; leaving the said *Sarah* his widow, but no issue of the said marriage.

[1382] The defendant *William Marchant*, the trustee named in the said articles, admits effects sufficient to satisfy the plaintiff's debt; UNLESS he has a right to RETAIN the same, towards satisfaction of the 700l. abovementioned: which he insists, he has a right to do, under the said covenant and deed of settlement; and that, upon his said plea, he might give the above covenant IN EVIDENCE.

The question submitted to the court, is, "whether the defendant, as administrator of the intestate *Peter Marchant* the younger, could, upon the plea of *plene administravit*, GIVE IN EVIDENCE the covenant abovementioned, to support his plea."

Mr. Eliab Harvey, for the plaintiff, argued that he could not.

1st. There can be no retainer at all, in this case; because here could have been no action of debt brought against the defendant as executor; it not being a debt in the testator, and consequently not in the executor: the testator has only covenanted "that his executor shall pay." *Perrot v. Austin*, Cro. Eliz. 232. is express to this purport.

So in the present case, no action of debt could have been brought upon this covenant: and as an action of covenant only sounds in damages, this covenant can not be insisted upon by an executor or administrator, to be set off by way of retainer, against the specialty-debt for which he is now sued.

2dly. The ground of retainer, simply, as it stands here, is not sufficient; there ought to be some previous requisition made upon the executor, by the wife or her trustees: or some act of the co-trustee, to justify it. It does not appear that the covenant was or would be insisted upon, against the administrator. Besides, here, the sixth months after the intestate's death were not expired: and consequently, no right of action had accrued.

3dly. This retainer being attended with very special

circumstances, it ought to have been *pleaded*: and if the truth of the case had been disclosed by *pleading*, the plaintiff might have then taken judgment of assets *quando acciderint*. But as "*plene administravit*" was pleaded; and as we knew we could shew assets, and did not nor could know any thing of this covenant, we are now *deprived of this benefit*.

4thly. This plea is not *substantially true*, "that he has [1383]
fully administered; when the assets are covered only during the wife's life.

He therefore prayed, that the *postea* might be delivered to the plaintiff.

Mr. Cox, *contra*, for the defendant.

1st. This is a *specialty* debt. This administrator, if he had not been also a *trustee* as well as administrator, might have *immediately* paid it to the trustee as soon as the intestate was dead: for, the six months is only an enlargement of the time of payment, allowed to the defendant for his ease and benefit; but it is a *debt*, before that. Therefore he may retain it, against a demand of *equal degree*.

2dly. No requisition or other act was necessary. As he could not sue *himself*, but might retain.

3dly. It was not necessary to *plead* it: this has been long settled. *Gough's case* 5 Co. 60.* The plaintiff suffers no inconvenience from not having judgment of assets *quando acciderint*: he may bring a fresh action, (if not have a † *scire facias*), as soon as the wife dies. If he had immediately paid it, he might have given *that* in evidence.

Mr. Harvey, in reply—

3d. In *this* method, the plaintiff may *lose* her debt: another person may get judgment *before* her.

4th. This is *not, in truth, a full* administration; because these assets may become answerable for this debt, *after the death* of the testator's wife.

Lord MANSFIELD—It is now settled, "that a [1384]
retainer of a debt may be given in evidence."

And as to the case of *Perrott v. Austin*, in *Cro. Eliz.* 232. It seems to be an extraordinary one, in itself; and there is a query upon it, in the very book. Besides, the testator is here bound in a *penalty*.

The real justice of the case is, that the plaintiff should [1384]
have judgment of assets, *quando acciderint*.

Mr. Justice DENISON thought it the clearest case that could be, and not to differ from the common case. This is a real debt; and the assets are bound by it; and it is a debt by *specialty*; therefore it is of an *equal* nature with another debt by *specialty*. Consequently, the present action being brought upon a debt by *specialty*, the administrator has a right to retain against it.

1763.

FLUMER
V.
MARCH-
ANT.

* See Viner, p. 266. Tit. Executors, ma. 2. "Ad administrator defendant may give retainer in evidence, or plead it, at his liberty." Brownl. 75. Bond v. Green.
† V. Bro. Executor, 18.

1763.
PLUMER
v.
MARCH-
ANT.

This case is just the same as if there were two executors : for payment to one is payment to both. He may retain what he might have paid.

An action of *covenant* is as much a lien upon the assets, as an action of *debt*.

Judgment of assets, *quando acciderint*, would have admitted the debt.

I see no difference between this case and the common case : the special circumstances signify nothing, here.

Mr. Justice WILMOT had no doubt:

Wherever the executor might have been sued, he may retain. And this is a debt of *equal* nature with that for which the action is brought. Therefore he may retain.

The intestate was himself bound : and the *liens* falls upon his representatives, though he *himself* could not have been sued.

But *without that*, I think this is a *debt* for a sum certain, and secured by specialty. Therefore there is no distinction, whether the man *himself* was to pay it, or his *representatives*.

The assets are bound, so long as the woman *lives*. It may happen, (by the co-trustee's surviving the defendant,) that the money may, at her death, be out of *THIS* man's hands : in which case, no new action or *scire facias* could have effect against *him*.

LORD MANSFIELD now observed, that there might be difficulties in the method of taking judgment *de bonis quando acciderint* ; (which had, *before*, appeared to him to be the right method ;) and therefore

Per LORD MANSFIELD and * both the other JUDGES, clearly and unanimously,

Let there be JUDGMENT of NONSUIT.

* Mr. J. Foster was absent.

Wednes. 4th
May, 1763.

[S.C. Bull. 93]

In some issues between lord and tenant, the plaintiff cannot give in evidence that there was not a sufficiency of common left.

D'AYROLLES, Esq. *versus* HOWARD.

UPON shewing cause against a rule which had been obtained by Mr. Solicitor General (Norton) on behalf of the plaintiff, for a *new trial*, upon the foot of a mis-direction by the judge of assize, it appeared that the action was an action of trespass brought by the lord of a manor against the commoner, for *spoiling and destroying his peat*, and *filling up the holes* out of which it was dug. To which, the commoner pleaded a justification under a *right of common* in and through the said waste appendant to his house, &c. And that the plaintiff had dug this peat in some parts of the common, and laid it up in other parts of it, whereby the defendant was *hindered from enjoying* his said right of common, in so *large and beneficial a manner* as he had used and had a right to do : and therefore he *justifies* the breaking and removing the said heaps, and

filling up the holes, doing as little damage as was possible. 1763.

The plaintiff (the lord of the manor) replied, that the defendant did the trespasses *de injuriâ suâ propriâ, absque tali causa*. Upon which, issue was joined. D'AYROL-LES V. HOWARD.

The principal question at the trial was, whether the plaintiff could, upon this issue, give in evidence "that there was a SUFFICIENCY of common LEFT."

Mr. Serjeant *Wynne* (who went as judge of assize to the last *Kingston* assizes) was of opinion, "that, upon this issue, he could not." And

THE COURT now concurred in the same opinion.

But however, as it appeared, that the merits had never been fully tried, they thought, that the present verdict for the defendant should be set aside on payment of costs by the plaintiff; and a new action brought by the commoner, against the lord; in which action, all the matters insisted upon (which were various) might be given in evidence; for, both sides declared a desire to have the real merits fairly and fully tried; viz. Whether the lord had or had not a right, and had always used, to dig peat upon this common, and lay it up there to dry.

[1386]

V. 1 *Siderfin* 106. *Goe v. Cother*: where the lord dug pits upon the common.

REX versus Corporation of WEST LOE.

Friday, 6th May, 1763.

ON Monday last (the second of May) Mr. *Dunning* moved for a *mandamus* to the corporation, to go to the election of a mayor; there being a judgment of ouster against Mr. *Buller*, the late mayor. Mandamus to go to election on judgment of ouster, cannot be moved for till judgment actually signed.

Mr. *Webb*, *contra*, then objected that they came too early with their motion: for, that judgment against Mr. *Buller* was not ACTUALLY SIGNED, but only a rule given on the *postea*; which is a four-day rule, and not yet out, (being given but the day before;) so that no judgment can be yet signed; and *non constat*, whether it ever will be.

Mr. *Dunning* relied on a late case, which he said was in point, viz. * *Rex v. Ollerhead*, in Easter term 1759, 32 G. 2. where the like *mandamus* was granted on Mr. *Morton's* motion the day after the giving the rule on the *postea*, and before the signing the judgment. * Or rather *Rex v. Corporation of Wigan*.

But THE COURT were clear, that if it was so done in that case; it was wrong.

Nothing was therefore taken by the motion of last Monday.

THE four-day rule being now expired, the adverse parties had a trial of skill, "which of them should get the start of the other in moving for a *mandamus*;" conceiving that they should get some advantage, by being before-hand with their opponents.

1763.

REX
v.

WEST LOE.

The *prosecutor's* clerk in court applied to me; in court, to sign the judgment against Mr. *Buller*: which (as they were now become regularly and indisputably intitled to ask,) I immediately began to do. When I had written (upon the proper stampt parchment) the following words—"On a verdict, judgment is signed for our lord the king against the defendant"—; and before I had proceeded any further towards finishing it and awarding the *capitatur*, ("let the defendant be taken";)

[1987]

Mr. *Webb*, having *pre-audience* of the *prosecutor's* counsel, moved, on behalf of another person, for a *mandamus* commanding the corporation to go to a new election; "judgment being signed against Mr. *Buller* the pre-ceding acting mayor; whereby the office was become vacant:" and he appealed to me for the truth of his assertion, "that judgment was actually signed against Mr. *Buller*." Whereupon I informed the court, exactly, of the above mentioned circumstances.

Mr. *Dunning*, on behalf of the prosecutor, objected to Mr. *Webb's* taking the advantage of his *pre-audience*, to get the start of him in this motion; which he assured the court, he was prepared to have made, as soon as it should have come to his turn to move; and which he could not make till judgment was actually signed.

THE COURT were clear, that the *prosecutor* was entitled to the * *priority* of this motion for a *mandamus*; and accordingly

Granted it to the PROSECUTOR,
(Upon Mr. *Dunning's* motion)

Saturday, 7th
May, 1763.

REX versus THOMAS HAYDON.

Indictment of witness for perjury, no reason why the judgment should be postponed against the person convicted.
† V. ante, p. 1369. 24th Nov. 1762.

MR. Serjeant *Nares*, supported by Mr. *Stowe* and Mr. *Ashurst*, moved, a few days ago, on behalf of the defendant, to postpone the judgment of the court upon him, till *Michaelmas* Term; having been convicted (as was alledged) upon the single evidence of † *John Burbage*, "of having promised him to give him three guineas, at the election for members of parliament for *Evesham*, &c." Which single witness, *John Burbage*, now stands indicted for PERJURY in giving that very evidence, and was indicted for it as early as was possible after committing the crime. They had an affidavit of all this matter, (made by this *Thomas Haydon*.)

Mr. Solicitor General (*Norton*) and Mr. *Morton*, contra, for the presecutor, premised, that as this defendant had been heretofore brought up to receive judgment, which was only put off till it should be seen whether any action would be brought against him, the case ought to stand now as it did then; and no subsequent indictment ought to affect it.

And they asserted, that he was so far from being convicted upon the *single* evidence of *Burbage*, that even his *own* evidence would have convicted him; and particularly the evidence of one *Penny*, who was called by himself, would *alone* have been fully sufficient to ground the conviction upon, even if *Burbage's* had been totally out of the case.

And they observed that the assignments of *Burbage's* perjury do not go to the point that was *in issue* upon *Haydon's* trial, but to *collateral* instances.

But their grand objection was, that "this *Thomas Haydon*, the defendant, is the first *witness* upon the back of the bill of indictment;" (which is a precedent of the most dangerous tendency:) and *all* or *all but one* of the *other* witnesses thereon, were *examined* at *Haydon's* trial.

Burbage also offered to take his trial at the last assizes: but this prosecutor did not comply with that offer.

N. B. On viewing the indictment and the names indorsed upon it, it appeared that *HAYDON* himself was the first witness: and that all the rest of the witnesses, except one *Clarke*, were actually examined at *Haydon's* trial.

LORD MANSFIELD—If the court were to defer pronouncing judgment against *Haydon*, he *could not be a witness* upon the trial of this indictment for perjury against *Burbage*; because he is so much *interested* in the event of it. And the other witnesses, all but *Clarke*, have already been examined upon *Haydon's* trial; and it does not appear, but that *Clarke* *might* have been. Therefore there is *no* reason to *defer* our judgment.

Mr. Justice WILMOT entirely concurred with his lordship.

And Mr. Justice DENISON shewed no marks of dissent.

Whereupon, (the time for bringing an *action* being now *elapsed*;) the defendant *Haydon* came into court: and

THE COURT committed him, and ordered him to be brought up again on this present *Saturday*, to receive judgment; which was—

To pay a fine of 200*l.* and be imprisoned for three months and until the fine be paid.

V. post. pa. 1440. under 22d *June* 1763.

PALMER *versus* NEEDHAM:

THE *original* demand was only 3*l.* 13*s.* 6*d.* the plaintiff brought an action for it; and obtained judgment, with *costs*. The debt and *costs* amounted to *above*

pieces discharged, original debt being under ten pounds.

1763.

REX

v.

HAYDON.

Monday, 9th
May, 1763.

[Contra,
4 Durn. 570.]

Special bail

1763. 10l. The plaintiff then brought an action of *debt upon this judgment*; and held the defendant to *special bail*.
 PALMER v. NEEDHAM. Mr. Solicitor General had obtained a rule to shew cause why the *bail-piece* should not be *discharged*, and *common bail* be accepted.

Mr. *Eliab Harvey* now shewed cause; and insisted that whether it was or was not necessary to *give special bail* in this case, yet as it was *actually given*, it ought not to be *discharged*.

BUT THE COURT were very clear, that as the *original debt* was under 10l. the *enhancement* of it by *adding* the costs, and so raising the total to *above* 10l. was *not* sufficient to oblige the defendant to give *special bail*; the intention of the act being only "that *special bail* should be required where the *original debt* amounted to upwards of that sum." And they were equally clear, that as *special bail* ought not to have been at all required, the *bail-piece* must be *discharged*, (though actually taken,) and *common bail* accepted.

Note—There was judgment by default; and a writ of error brought; and it was part of the motion, "to stay execution till four days should be expired after the determination of the writ of error."

RULE made ABSOLUTE.

Friday, 19th
May, 1763.

LE BRETON versus BRAHAM.

Plaintiff
ought to
give the de-
fendant the
particulars of
his demand.

[1390]

UPON the motion of Mr. *Caldecott* (made on *Saturday* last) on behalf of the defendant, the court gave him a rule upon the plaintiff (who was by profession an *attorney*) to shew cause why proceedings should not be stayed till he should give the defendant an account of his demand; and that the defendant have time to plead, till such account be given her by the plaintiff.

He moved it upon an affidavit "that the plaintiff refused to acquaint her with the nature or particulars of his demand; and that she had offered to pay him, immediately, whatever was due to him from her."

It was an action for money lent, and monies laid out to her use.

Lord MANSFIELD thought it reasonable that in all cases, (as well where attornies were plaintiffs, as where other persons were plaintiffs,) the plaintiff ought to give the defendant an account of the particulars of his demand.

The present motion ended in a rule of reference to the master (by consent,) to see what was due.

The end of *Easter Term*, 1763. 3 G. 3.

Note—Mr. Justice FOSTER was absent all this term.

TRINITY TERM,

3 GEO. 3. B. R. 1763.

REX *versus* SHOWLER and ATTER.

MR. Eliab Harvey shewed cause against quashing an order of sessions which confirmed an order of two justices of *Lincolnshire-Lindsey*, nominating and appointing *Thomas Showler* and *John Atter*, being substantial house-holders of the township or village of *Haugh*, in the said parts, to be overseers of the poor of the said TOWNSHIP OR VILLAGE of *Haugh*, for the year next ensuing, according to the direction of the statute in that case made and provided; and also against quashing the said original order of the two justices. The case was as follows.

THOMAS SHOWLER, one of the said overseers so appointed, having appealed to the general quarter-sessions, from this warrant or order of appointment, the first sessions adjourned it to the next. They state, that it appears to them, that the said *John Atter*, in the said appointment named is a *day-labourer*; and that the said place called *Haugh*, consists of a capital messuage, in which, *Thomas Showler* in the said appointment named, with all his family, dwells; and of two small ancient cottages; and of one other small cottage, lately built; all which cottages are let along with the said capital messuage, and the farm thereunto belonging, to the said *Thomas Showler*; and of another tenement, part of the said capital messuage; and all of them inhabited by families; and that one of the cottages is inhabited by the said *John Atter* and his family; and another of the said cottages is inhabited by another day-labourer, and his family; and the other of the said cottages is inhabited by a shepherd and his family; and the tenement part of the said capital messuage is inhabited by a poor widow and her five children: all which occupiers of the said cottages, and of the said tenement part of the said capital messuage, are under-tenants to the said *Thomas Showler*. The said court of sessions therefore orders and adjudges "that *Haugh* aforesaid is a village or township; and that the said "warrant or order of appointment be confirmed."

[1391]

*Mr Justice Foster's health did not permit him to come to Westminster-hall during this whole term.

Friday, 3d June, 1763.

[S. C. 1 Bl. 419.]

Appointment of overseers for a village or township orderquashed, because the place was not so.

[16 Vin. 418.

1 Wils. 138.

Vin. Mand.

(K.)Str.1004.]

[1392]

1763.

REX
V.
SHOWLER
and
ATTER.

Mr. *Harvey* and Mr. *Kemp*, in answer to the two objections that had been made to these orders, (*viz.* 1st. "That the facts stated shew that this place is *neither a township nor a village*;" 2dly. "That *Atter* appears to be only a *labourer*, not a substantial householder:") insisted,

1st. That the sessions have determined right in adjudging *Haugh* to be a *village*: for, it appears upon the state of the case, to be so.

1 *Inst.* 115. defines a village, as consisting *ex pluribus mansionibus et pluribus vicinis*. And here are *five* distinct mansions: which number answers to the term "*plures*."

And both *Spelman's Villare Anglicanum*, and *Cambden's Britannia* mentions this place as a *village*: which is, at least, a reason for sending the order back to the sessions, in order that the facts may be more fully stated.

They said, the two cases cited out of Sir *John Strange's* Reports, *viz.* 2 Sir *J. S.* 1004. *Denham v. Dalham*, and 2 Sir *J. S.* 1071. *Stoke-prior* and *Grafton*, are not applicable to the present case. For, the § former was upon

§ See my Settlement Cases, an order of removal: and *Southwold park*, the extra-
No. 11. Rex parochial place, consisted of *only two* houses and two
v. Inhabitants families; which could not be called *plures*.† The latter
of Denham. was a nobleman's seat, converted *within time of memory*
† See my Settlement Cases, into five houses and farms: but that case was *never*
No. 91. Rex *argued*; and the rule was made absolute without defence.
v. Inhabitants
of the manor
of Grafton.
[19 & 14 C. 2. "charged."

c. 12. s. 21.
17 Geo. 2.
c. 38. s. 15.]

Lord MANSFIELD observed, that by this method, a place might be *made* into a village, which in fact was not so; and the inhabitants of it might by this contrivance *withdraw* themselves from contributing towards the support of the poor of their parish.

If it be really a vill, you may make another appointment.(a)

[1793]
* V. 2 Sir
J. S. 1143.

Mr. Justice WILMOT cited and laid a good deal of stress upon a case in *M.* 1740, 14 G. 2. B. R. * *Rex v. Inhabitants of Welbeck*: which Mr. Justice Denison also said be very well remembered. It was a *mandamus*

(a) It seems by what is stated, as if there were no other but *Showler* who was better than a labourer; if so, to what purpose should another appointment be made, if only to appoint *Showler* by himself; why not quash it only as to the other?—Note, it afterwards appeared to the annotator from a copy of the order of sessions, that the facts as above were conjectured.

to appoint overseers in and for the *village of Welbeck*: and the return was, "that it was extraparochial, and is not nor was, nor is or ever was reputed to be a village or a township; and therefore they cannot appoint any persons to be overseers of the poor of it." And this return was allowed; upon the principle "that the court have no power to issue such *mandamus*, but upon the supposition of its being a vill or township."

1763.
 REX
 v.
 SHOWLER
 and
 ATTER.
 [Salk. 487.
 2 Rol. R. 160.]

BOTH ORDERS QUASHED.

Note—Their answer to the 2d objection was, that the original order *expressly* called Atter "a substantial householder."

But, as the court were so clear against the orders upon the *first* objection, as to allow it without even hearing the counsel who were to argue in support of it; this *second* objection was not discussed, nor even entered into.

BATES *versus* GAMBLE.

UPON the application of an insolvent debtor, on 32 G.2. c. 28. § 13. The court ordered the petitioning debtor to be brought up again upon the *last day of this term*, (instead of the first day of the *following* term.) For, this last act † only directs, *in general*, "that the court shall by order or rule cause the petitioning prisoner to be brought up on *some other day* to be appointed by such said court, some time at furthest, within the first week of the term next following the time of such examination: but SOONER, if any such court shall so think fit." And as these persons live both in the *same town*, and the plaintiff has *already* had a copy of the schedule fourteen days at least (as the act requires,) it would be hard to keep the defendant in prison during the whole long vacation.

Saturday, 4th
 June, 1763.
 When
 insolvent
 debtor ought
 to be brought
 up a second
 time.
 † p. 499.
 (part, of s. 13.)

N. B. By 2 G. 2. c. 22. § 9. p. 424. If the creditor be not satisfied, but shall desire further time to inform himself, the court shall remand the prisoner, and appoint another day some time *within the first week of the term next following*, (which was the former practice.) But the present act leaves the time of bringing the prisoner up again, to the *discretion* of the court.

GLOVER *versus* BLACK.

THIS was a case reserved at the sittings before Lord Mansfield, at Guildhall, after Michaelmas term 1762. 422.] Respondentia and bottomree interest must be expressly mentioned and specified in the policy; but special interest in goods may be given in evidence, if the circumstances of the case shall admit of it.

[1394]
 Tuesday, 7th
 June, 1763.
 [S. C. 1 Black.
 396, 399, 405,

1763.
GLOVER
v.
BLACK.

It was an action on the case upon a *policy of insurance* bearing date the 16th of *December* 1760, made on goods and MERCHANDIZES *loaden or to be loaden* on board the good ship or vessel called the *Denham*, whereof was master Captain *William Tryon*, "AT AND FROM BEN-GAL to any ports or places whatsoever in the *East Indies*, until her safe arrival in *London*:" which policy was under-written by the defendant for 200*l.* for a premium of 10*l.* *per cent.*

The plaintiff declared for a *total loss*.

The defendant pleaded the general issue.

The cause coming on to be tried at *Guildhall, London*, on 1st *December* 1762, before Lord *Mansfield*, it appeared in evidence,

That the defendant underwrote the policy and received the premium, as stated in the declaration.

That before the underwriting of the policy, the plaintiff had lent to *William Tryon* the master of the ship, UPON THE GOODS *then loaden and to be loaden* on board the said ship *on account of the said William Tryon*, the sum of 76*l.* at RESPONDENTIA: for which, a RESPONDENTIA-bond was executed by Captain *Tryon*, and one *Joseph Bustoll* to the plaintiff. The bond was in common form; and recited "that the above-named *Alphonsus Glover* had on the day of the date lent and advanced unto the above bounden *William Tryon* the sum of 76*l.* UPON THE MERCHANDISES AND EFFECTS *laden and to be laden* upon the account of the said *William Tryon*, on board the good ship or vessel called the *Denham*, of the burthen of 499 tons or thereabouts, now in the river of *Thames*, whereof he the said *William Tryon* is the commander." And the condition was, "that if the said ship should with all convenient speed proceed and sail *from and out of the said river of Thames*, on a voyage to any parts or places in the *East Indies, China, Persia* or elsewhere beyond the *Cape of Good Hope*, and from thence should sail and return into the said river of *Thames*, at or before the end or expiration of thirty-six calendar months, to be accounted from the day of the date of these presents; and that, without deviation (the dangers and casualties of the seas excepted;) and if the above-bounden *William Tryon* and *Joseph Bustoll*, or either of them, their or either of their heirs, executors or administrators should within thirty days next after the said ship or vessel should be arrived in the said river of *Thames* from the said voyage, or at the end and expiration of the said thirty-six months, to be accounted as aforesaid (which of the same times shall first and next happen) well and truly pay or cause to be paid unto the said *Alphonsus Glover*.

[1395]

“ his executors, administrators or assigns, the sum of
 “ 1008l. and 9s. of lawful money of *Great Britain*, toge-
 “ ther with 12l. and 4s. of like lawful money by the month,
 “ and so in proportion for a greater or lesser time than
 “ a month, for all such time, and so many months as
 “ shall be elapsed and run out of the said thirty-six
 “ months, over and above twenty months to be accounted
 “ from the date of these presents; or IF in the said
 “ voyage, and within the said thirty-six months to be
 “ accounted as aforesaid, an UTTER LOSS of the said
 “ ship by fire, enemy’s men of war, or any other casualty,
 “ shall unavoidably happen, and the said *William Tryon*
 “ and *Joseph Bustoll* or either of them, their or either
 “ of their heirs, executors or administrators should
 “ within thirty-six calendar months next after such loss
 “ pay and satisfy unto the said *Alphonsus Glover*, his
 “ executors, administrators or assigns a just and propor-
 “ tionable AVERAGE on all the goods and effects of the said
 “ *William Tryon* carried from *England* on board the said
 “ ship, and all other goods and effects which the said
 “ *William Tryon* shall acquire during the said voyage, and
 “ shall NOT be unavoidably lost; then the above-written
 “ obligation to be void; or else to be and stand in full
 “ force, virtue and effect.”

1763.
 GLOVER
 V.
 BLACK.

That on the 31st of *March* 1760, the said ship *Denham* was at *Fort Marlborough* in the *East Indies*, within the limits insured; and had then and at the time of the loss hereafter mentioned, *divers goods and merchandizes on board her*, which were the property of the said *William Tryon*, and of greater value than all the money he had borrowed.

That on the said 31st of *March* 1760, the said ship, with her lading on board her, was BURNT at *Fort Marlborough* aforesaid; and thereby ALL the goods and merchandizes aforesaid of the said *William Tryon* were TOTALLY consumed and lost.

THIS proof being given of the PLAINTIFF’S INTEREST, the jury found a verdict for the plaintiff, subject to the opinion of the court “ whether, on THIS evidence, the plaintiff was intitled to recover on this policy.”

[1396]

See the statute of 19 G. 2. c. 37. § 5. whereby it is enacted “ that all money to be lent on bot-
 “ tomree or at *respondentia*, upon any ship belong-
 “ ing to any of his majesty’s subjects bound to or
 “ from the *East Indies*, shall be lent only on the
 “ ship, or on the merchandize or effects on board of
 “ such ship: and shall be so expressed in the con-
 “ dition of the bond; and the benefit of salvage
 “ shall be allowed to the lender, his agents or
 “ assigns; WHO ALONE shall have a right to make

1763.
GLOVER
v.
BLACK.

"assurance on the money so lent. And no borrower of money on bottomree, or at *respondentia* shall recover more on any assurance, than the value of his interest on the ship, or in the merchandizes or effects on board: exclusive of the money so borrowed. And in case it shall appear that the value of his share in the ship or in the effects on board doth not amount to the full sum or sums he hath borrowed, such borrower shall be responsible to the lender for so much of the money borrowed as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurance and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost."

This case was first argued on Tuesday 1st of February 1763, by Mr. Yates for the plaintiff, and Mr. Harvey for the defendant; and again on Tuesday 26th of April, by Mr. Morton for the plaintiff, and Mr. Solicitor General (Norton) for the defendant.

THE COUNSEL for the plaintiff insisted that the lender of this money had an INTEREST in the goods, though they were the property of the borrower: the lender is the trader, against the risque of the sea.

Respondentia is an interest that may be insured: and it is not necessary to SPECIFY in the policy, "that it is a *respondentia* interest only, which is insured." It appears by 19 G. 2. c. 37. § 5. that a *respondentia* interest may be insured as merchandize: and this insurance is upon goods and merchandize.

Here could be no fraud: nor is any pretence of fraud proved. If the insurer had had a double interest, both of goods and of *respondentia*, the insurance would have covered both.

[1397] They cited *Godin et al. v. the London Assurance Company*, * where *Meibohm* and *Tamez* had both of them *
* Vide ante, Vol. 1. p. 489. consigned goods to *Amyand*; and both insured: and it was holden that as each had a separate interest, each might insure.

THE COUNSEL for the defendant insisted, that the lender of money upon *respondentia* has no interest at all in the goods that the borrower either carries out or may acquire in *India*: and consequently, he can not insure them. The borrower had the whole disposal of them: he was only bound to allow for the salvage, if any happened upon the loss of them. The whole of the bond turns upon the

SHIP'S returning in safety. The lender has nothing to do with the goods.

This therefore differs greatly from a *mortgage*, where the *thing mortgaged is bound* to the payment of the debt; and therefore a *property* in the thing mortgaged is vested in the mortgagee, and he may insure it: whereas, the *lender on respondentia* has no sort of property or interest, either general or special, in the goods.

Upon *East India* voyages, five things may be insured; viz. goods, *respondentia*, bottomree, freight, and the ship itself: but it is absolutely necessary that each be *particularly SPECIFIED in the policy*: and the *respondentia interest* in this case ought to have been so. For, an insurance on a *ship* is no insurance of *freight*, though it be the same owner: much less is the general insurance on *goods*, the property of one person, an insurance of a *respondentia-interest* of another person.

An insurance on *goods* can only mean such interest as the *proprietor of the goods* had: and here the *property and possession* both remained in *Captain Tryon only*.

The under-writer ought to be apprized *WHAT it is*, that he does insure: and it is extremely easy for the *insured* to specify this particular interest. But the insurer can not otherwise be apprized of it: and it would be most unreasonable that the insured should avail himself of a *concealed* particular interest, under a *general* expression, *CONTRARY to custom and usage*.

There is a settled known *form* of insuring the *respondentia* and the *bottomree* interest *specifically and nominatim*. And this is the very first instance of such a claim as this, except that of one Mr. *Edwards*, of a loss founded upon a *respondentia-bond*: but there the insurers refused to pay it: and *Edwards* *acquiesced*, and received back his premium.

The *custom* of all insurances is to mention the thing insured *precisely*: and a strong reason why it ought to be *ascertained*, is, because the *course* of returning the premium, or part of it, differs according to the different nature of the thing insured. The under-writer returns to the insured so much of the premium as there was, in fact, *no risque upon*. But there would be an end of all chance of that, if the lender of money on *respondentia* could insure it *as goods*: for, if the ship came home safe, he might **receive his WHOLE PREMIUM BACK*, upon shewing [* *Lege, receiving* "that he had no goods on board;" and yet might keep covered] this his *respondentia* interest *IN PETTO*, to claim upon it, in case the ship should be (as it was here in fact) *lost*.

Therefore proof of a *respondentia-interest only* is no evidence to subject the insurer to the payment of the mo-

1763.

GLOVER
V.
BLACK.

[1398]

1763.
GLOVER
V.
BLACK.

ney thus pretended to be insured by the lender without specifying it.

According to the latitude here taken, the insured might make his election *after* the event; and it would lie quite open to *fraud* and *uncertainty*, if he should be left to declare in future, what it was that he meant to insure, *after* the event has happened. This can not but be *introductive of fraud*.

Nay further, this is a *fraud*. This money lent is to be repaid on the return of the ship to the port of *London*; the risque is "at and from *LONDON* to *London*:" whereas the present insurance is only "at and from *BENGAL* to *London*;" which is enough to answer for the safe bringing home of *Glover's goods from India*; but was only an insurance of *half* his *respondentia*-interest; as an insurer on *respondentia* runs the risque of the *whole* voyage. Therefore it *never was originally intended* to include the *respondentia* interest in the *present* policy. So that here is an apparent *fraud* upon the face of the policy.

By 19 G. 2. c. 37. (which was made to prevent wagering policies,) the insured ought to have an *interest on board*, equal to the sum insured. In *respondentia* insurances there is *always* a clause "that the *respondentia*-bond shall of itself be a proof that there is such an interest on board:" and the *PREMIUM* is accordingly. Many insurers will not insure *respondentia* interest at all: and that *very circumstance* proves that it ought to be *specifically named*.

[1399] In case of a *general average*, the insurers of a *respondentia*-interest *never contribute*: the average is always contributed to by the insurers *on the goods*.

In *Godin's* case, both the insured had a *property* in the goods. But that case is by no means a proof "that a *respondentia* interest can be insured as goods."

Therefore they concluded that the plaintiff can not recover upon *this* policy, without shewing some interest in the goods.

THE COUNSEL for the plaintiff, in reply, said this was the plainest case possible.

Before 19 G. 2. c. 37. Any man might have been insured, though he had no interest at all. Since that act, it is necessary to *prove* an interest.*

* Sect. 8.

A *respondentia*-interest is an interest: and there is no more reason for specifying *this* interest, than for specifying the *particular sorts* of goods insured. The plaintiff was a creditor upon the voyage: and he has proved his loss

The under-writer could not have been in a better case, if he had *known* what sort of interest the plaintiff had,

than if he did *not* know it; nor could he have expected a *larger premium*.

It may perhaps sometimes be the *interest* of the *respondentia* creditor, to *name* it in the policy; because it frees from average, and he is yet intitled to the benefit of salvage.

As to fraud—The lender might have been satisfied to stand his own insurer outwards; and might afterwards see reason to insure his interest homewards. But *no fraud* appears; nor was there the least attempt to prove any: therefore none shall be presumed or imagined.

THE COURT took some time to think of this case. And now

Lord MANSFIELD delivered their resolution: (which, he said, they had very fully considered.)

He owned, that at the trial, and also since, upon the argument here, he did lean to support this insurance: and his reason for so doing was, that he was satisfied of its being a *fair* insurance; and that the doubt which had arisen upon it was only occasioned by a slip in *omitting* [1400] to specify (as it was intended to have been done) "that this *was* a *respondentia* interest."

The ground of supporting this insurance, if it could [4 East. 324.] have been supported, was a clause of the act of 19 G. 2. c. 37. viz. the 5th section; which runs in these words—
 "that all and every sum and sums of money to be lent
 "on bottomry or at *respondentia* upon any ship or ships
 "belonging to any of his majesty's subjects bound to or
 "from the *East Indies*, shall be lent *only on the ship*, or
 "on the *merchandize or effects* laden or to be laden on board
 "of such ship; and shall be so expressed in condition of
 "the bond; and the *benefit of salvage shall be allowed to*
 "the lender his agents or assigns, *who alone* shall have a
 "right to make assurance on the money so lent. And
 "no borrower of money on bottomree or at *respondentia*
 "as aforesaid shall *recover more*, on any assurance, than
 "the value of his interest on the ship or in the merchan-
 "dizes or effects laden on board of such ship; *exclusive*
 "of the money so borrowed: and in case it shall appear
 "that the value of his share in the ship or in the mer-
 "chandizes or effects laden on board doth not amount
 "to the full sum or sums he hath borrowed as aforesaid,
 "such borrower shall be responsible to the lender for so
 "much of the money borrowed as he hath not laid out
 "on the ship or merchandizes laden thereon, with law-
 "ful interest for the same, together with the assuran-
 "ces and all other charges thereon, in the proportion
 "the money not laid out shall bear to the whole money
 "lent, notwithstanding the ship and merchandizes be
 "totally lost."

1763.

GLOVER
V.
BLACK.

1763.
GLOVER
v.
BLACK.

Now this act, to the purpose of *insurance*, considers the *borrower* as having a right to insure *only for the SURPLUS value* over and above the money he has borrowed on *bottomree* or at *respondentia*. And *lenders at respondentia* or on *bottomree* may, to *many* purposes, be said to have a *LIEN*.

Yet we are ALL very well satisfied, after a more particular consideration, "that this act of parliament *never meant or intended* to make any *alteration* in the *manner* of insurances. Its *view* was to prevent *gaming or wagering* policies, where the insurer had *no interest at all*. And if the lender of money at *respondentia* was to be at liberty to insure for *more than his whole interest*, it would be a *gaming policy*: for, it is obvious, that if he could insure *all the goods*, and insure his *respondentia* interest *besides*, this would amount to an insurance *beyond* his whole interest.

[1401]
* Vide s. 6.

The act considers the *form* of the policies just as they stood before the making of it; and provides, * that on all actions brought on policies of assurance, the plaintiff or his attorney or agent shall, within fifteen days after he shall be required by the defendant or his attorney or agent, declare in writing "what sum or sums he hath assured or caused to be assured in the whole, and what sum he hath borrowed at *respondentia* or *bottomry* for the voyage or any part of the voyage in question in such suit or action." And in describing *respondentia*-interest, it gives the *lender alone* a right to make *insurance on the money lent*. So that this act left it upon the *PRACTICE*.

His lordship said, he had looked into the *practice*; and he found that *bottomree* and *respondentia* are a *particular species* of insurance in themselves, and have taken a *particular denomination*: and he could not find even a *dictum*, in any writer, foreign or domestic, "that the *respondentia*-creditor may insure upon the *goods as goods*." And in *this* very case, the *respondentia*-interest was *intended* to have been *specified*: but was omitted to be so, by *mistake*.

He declared, that he found, by talking with intelligent persons very conversant in the knowledge and practice of insurances, "that they *always do mention respondentia* interest whenever they *mean* to insure it."

This their present determination would not, he said, interfere with that of *Godin et al. v. London Assurance Company*, with regard to a lien on the goods; because *this* kind of interest has taken a particular denomination.

It might be greatly inconvenient, to introduce a *practice contrary to general usage*. And there may be some opening to fraud if it be not *specified*.

He declared the ground of the present resolution to be this—"that it is *established* now, as the *law and practice* of merchants, that *RESPONDENTIA* and *BOTTOMREE* must be mentioned and specified in the policy of insurance." But he declared, at the same time, that they did not mean to determine generally, "that no special interest in goods may be given in evidence, in other cases than those of *respondentia* and *bottomree*, if the circumstances of the case shall admit of it."

1763.

GLOVER

V.

BLACK.

[4 Via. 279.]

PLAINTIFF to be NONSUITED.

MAYOR of YARMOUTH *versus* EATON.

[1402]

Tuesday, 7th
June, 1763.

THIS was an action upon the case on *assumpsit*. The declaration contained ten counts; which, in substance, amounted to no more than *this*, that the plaintiffs and those whose estate they have, have had and received, and been used and accustomed, and have a right to have and receive a certain TOLL upon exportation of corn and grain from their port of *Great Yarmouth* to parts beyond sea: and that the defendant exported certain quantities of corn and grain, without paying the toll.

Toll thorough requires a consideration to be shewn, to support the demand of it; because it is against common right.

The defendant demurred specially to the six first counts, and also to the ninth: and to the 7th, 8th, and 10th he pleaded the general issue, "*non assumpsit*."

The plaintiffs joined in demurrer, upon the other seven counts.

The present argument turned singly upon the cause of demurrer to the first count, (which *same* cause was also assigned in the other six demurrers.) So that it will be sufficient, if this first count be particularly stated, without meddling with the rest.

[See 1 Durn.
618, 664, 667.
3 Ves. jun.
660.]

It was in these words—"Whereas the borough of *Great Yarmouth* in the county aforesaid now is, and from time whereof the memory of man is not to the contrary, hath been an ancient borough; and whereas the said mayor, aldermen, burgesses and commonalty of the borough of *Great Yarmouth* aforesaid, on the first day of *May* in the year of our Lord 1752, and long before and ever since, had and received, and have used and been accustomed and of right ought to have had and received, and still of right ought to have and receive a certain DUTY or TOLL, called *measurage*, of and from every merchant exporting corn or grain, in any ship or vessel, from the port of *Great Yarmouth* aforesaid to parts beyond the seas, to wit, two pence by the last for every last of corn or grain measured and exported as aforesaid; the said mayor, aldermen, burgesses and commonalty in fact say, that the said *Christopher Eaton*, between the said first day of *May* in

1763.
MAYOR of
YAR-
MOUTH
V.
EATON.

" the year of our Lord 1752, and the first day of *April* in
" the year of our Lord 1762, being a merchant exporting
" ing as aforesaid, did export, in certain ships or vessels
" from the port of *Great Yarmouth* aforesaid to parts
" beyond *the seas, divers lasts of corn and grain, to wit,
" 30,000 lasts of corn and 30,000 lasts of grain measured :
" by reason of which said premises, the said *Christopher*
" *Eaton* became liable to pay to the said mayor, alder-
" men, burgesses and commonalty the sum of 500*l.* of
" lawful money of *Great Britain*, being two pence by
" the last for every last of the said corn and grain so ex-
" ported by him as aforesaid, that is to say, at *Great*
" *Yarmouth* aforesaid ; and being so liable, the said *Chris-*
" *topher*, in consideration thereof, afterwards, to wit, on
" the same first day of *April* in the year of our Lord 1762,
" at *Great Yarmouth* aforesaid, undertook, and to the
" said mayor, aldermen, burgesses and commonalty then
" and there faithfully promised to pay to them the said
" sum of 500*l.* when he should be thereunto afterwards
" required."

The SPECIAL cause of demurrer was assigned by the
defendant in the following words—"And for causes of
" this demurrer in law, the said *Christopher*, according
" to the statute in such case made and provided, assigns
" the following objections, that is to say, for that the
" said mayor, aldermen, burgesses and commonalty have
" NOT *shewn or alledged*, in the said first six counts of
" the above declaration, or in any of those counts, ANY
" BENEFIT *which the said CORPORATION perform or are*
" *bound to perform to the PUBLIC, or ANY CAUSE or CON-*
" *SIDERATION whatsoever UPON WHICH their pretended*
" *prescription is* FOUNDED : and for that the said six
" counts are and each of them is, in *other* respects, insuffi-
" cient and defective in form, &c."

The single question upon this demurrer was, " whe-
" ther it was incumbent upon the plaintiff, in this action
" on *assumpsit*, to *set forth* in his declaration a CONSI-
" DERATION for the toll which he demands."

It was argued, first, on *Friday* the 29th of *April* last,
by Mr. *Yates* for the defendant, and Mr. *Wallace* for
the plaintiff ; and again now, by Mr. *Willes* for the de-
fendant, and Mr. Solicitor n eral (*Norton*) for the
plaintiff.

THE COUNSEL for the defendant argued that as this
was not an action brought against a wrong-doer, for a
tort ; but an action grounded upon a demand of a RIGHT,
it was necessary for the plaintiff to *shew a consideration*
for the right he demands : and to prove the distinction
between actions against wrong-doers, for *torts* ; and actions
which demand a *right* ; they cited *Owen* 109. *Escot* against

Laureny, in *B. R.* And it is more especially necessary in the present case, as this is a *claim against the general and common right of the subject, which is antecedent to every usage and prescription; and grounded upon a prescription which affects the public.

To support this manner of reasoning, they cited *Cro. Jac.* 213. *Buckingham v. Costendine*: where a declaration in *assumpsit* was holden to be ill, because it did not shew for what cause the debt became due.

And they observed that a man can not prescribe to have *Thorough-toll* without alledging a special consideration.

They cited and argued from the cases in 2 *Ro. br.* 522. title *Toll*, letter *B. pl.* 1. *Sir William Jones* 162. *Roy v. Corporation of Boston*. *Moore* 574. *Smith v. Shepherd*. 1 *Mod.* 47. *Haspurt and Wills*. 1 *Mod.* 104. *Warren and Prideaux*. 2 *Let.* 96. *Prideaux v. Warne S.C.* 2 *Lutw.* 1519. *Wilkes v. Kirby*; and 2 *Sir J. S.* 1228. *Sarjent v. Reed*. And 4 *Mod.* 319. *Warrington v. Moseley*, proves, they said, that some reason ought to be shewn why this duty is claimed. So also does the case of the Mayor of *Nottingham v. Lambert*, 11, 12 *G. 2.* in *C. B.* on a special verdict: where, no consideration appearing, the court would not intend any, and gave judgment against the plaintiff. [Post. 1407.]

There is no difference, they said, between its being upon a declaration, and its being upon a plea; where the question turns upon a claim of right; especially, where the claim is against the general right of the subject.

They made a difference between prescriptions for private rights and prescriptions that affect the public. They admitted, that in the former, a consideration may be implied: but in the latter, a sufficient consideration must be shewn.

They admitted also, that even in this case, if it had appeared upon the declaration, "that the corporation were owners of the port," that would have been a sufficient consideration.

But it does not appear any where upon this declaration, even that the corporation are owners of the port: the public are the owners of it. And the implied consideration for a port-duty can only be where the PLAINTIFF is owner of the port, 21 *H. 7.* 40. *Hob.* 175. *Topsall v. Ferrers*.

THE COUNSEL for the plaintiffs answered, that *thorough toll* has no similitude to the present case: that is for passing through a town, in the highway; which, by common law and common right, is free to every body. [1405] Therefore it may there be necessary to alledge a special consideration.

But the present case IMPLIES a consideration: it is a

1763.

MAYOR OF
YAR-
MOUTH
V.
EATON.

1763. port granted to the corporation; and was made out of
 MAYOR of *private property*. The public therefore in this case enjoys
 YAR- a benefit which it had no pretence of claim to, by com-
 MOUTH mon law: and *this alone* is a sufficient consideration.
 v. 2 *Lutw.* 1519. *Wilkes v. Kirby* is the same point as the
 EATON. present: and though that case was not determined, yet
 the court *strongly inclined* "that the owner of a port may
 "have a toll by prescription, WITHOUT *allegding any*
 "consideration."

But 3 *Lev.* 37. *Mayor and Commonality of London v. Hunt*, in the *Exchequer* chamber, is in point. It was *assumpsit* for weighage of goods brought into the port of London: and objection was taken, "that there was no consideration for the duty." But it was resolved "that the defendant had the liberty of bringing them into port; which is a place of safety, and it therefore implies a consideration in itself."

[S. C. 2 Wils.
95.]

And so also was a late case in C. B. *The Corporation of Exeter v. Trinlet*, Tr. 32, 33 G. 2: where the title to the toll was set out *precisely as it is here*; and the defendant demurred *generally* to the declaration. The case was twice or thrice argued upon *this very objection* now taken here, "that no consideration for the duty was set forth:" and all the objections there taken (which were the same as were now taken) were overruled: and it was holden, "that if it had gone to a trial, the plaintiff must have proved a title; and that a liberty to bring goods into a port is *in itself* a good consideration for the toll."

As to its not appearing upon the face of the declaration "that the corporation are owners of the port;"—we have shewn "that they have always been *accustomed to receive the toll*, and that they always *have received* it, and that they are *intitled to receive it*;" and all this must have been *proved* at the trial, if it had gone on to a trial: and *if* their being owners of the port was *necessary*, it must have been *proved* at the trial.

[2 *Lev.* 97.]

But, however, a person may be intitled to the toll, *without* being owner of the port: for, the crown may surely grant the duty, though they *retain* the port; and the grantee may prescribe for it.

[1406]

This is good enough, on demurrer: it is *not assigned* for cause of demurrer; and it is therefore upon the same foot as if it was a *general* demurrer. In *assumpsit*, the debt is the consideration. *Hibbert v. Courthorpe*, Carth. 276.

THE COUNSEL for the defendant, in reply, admitted that if goods are brought into a port and unladed, a consideration for the duty to the owner of the port shall be implied. But here the plaintiffs do not shew that they

had *any sort of right* to the port, or any thing to do with it. The cases, therefore, where the plaintiffs *had a right* to the port, do not apply to *this* case, where they have *it not*. But cases of thorough-toll *are* applicable to the present case; as they prove "that a *public* right can not "be *abridged* without a consideration." And though in *private* prescriptions, a consideration may be implied; yet in those which go to the abridgment of *public* rights, it is *not* so.

1768.
MAYOR OF
YAR-
MOUTH
V.
EATON.

The only case in point cited on their side is that of the *Mayor of Exeter v. Trinlet*: but it is a *single* case; and is contrary to that of the *Mayor of Nottingham v. Lambert*; and was on *general* demurrer, whereas this is on *special* demurrer, for *this* cause particularly assigned. Upon a *general* demurrer, the court might not consider it as matter of substance.

If the crown could grant the duty, reserving the port; yet the plaintiffs must *shew* the *grant*.

LORD MANSFIELD—This is a very plain case, indeed. The plaintiffs set out that they have a right, by prescription, to the port-duties of *Yarmouth*.

The question is, "whether they are obliged to *set out* "a *consideration*."

The only cases like the present, are cases for PORT [Post. 1407.
2 Lev. 97.]
duties: the rest are all *out* of the case.

The MAKING A PORT is *itself* a *consideration*. It is a self-evident convenience to the merchant: it speaks for itself. It may *never* require repair: therefore I do not know that it is necessary to *shew* repair.

The ownership of the soil is out of the case.

But here is a *precedent in point*, established by a judgment of a court in *Westminster-hall*, upon solemn argument, and after considering all the former cases and precedents: and this precedent is punctually followed in the present case. [1407]

THIS *alone* would be sufficient, if the *reason* of the thing was not so strong as it is. (a)

(a) Vide 2 *Vez.* 621. that petit customs are different from tolls, *per* *Ld. Hardwicke*; and vide 4 *Com.* 408. *acc.* Note, that the case in 2 *Wils.* on which this was determined, arose upon a prescription for the former, and not for tolls, as in this case; and it seems contrary to principles and all former authorities, that a title to the latter should be maintained with a consideration; and it is also observable that the case in 2 *Wils.* was determined on a special and this on a general demurrer; and N. B. the petit customs were confirmed by act of parliament. *Forst. Dig. of Cust.* 26.

1763.
MAYOR of
YAR-
MOUTH
v.
EATON.

Mr. Justice DENISON also thought it good, notwithstanding the special demurrer.

He thought the title sufficiently shewn. A port may not want repair in 200 years.

[20 Vin. pl.
101.]

The declaration shews a prescriptive title out of mind for these port-duties. The consideration is self-evident; viz. the *benefit to the subject*. It is not necessary to shew that the corporation are *OWNERS of the soil*, or *repair* it. It is not now necessary to shew repairs of a pew in a church; because it may scarce ever *want* repairing.

And here is an established *precedent*, besides the self-evident consideration. This is *not* like the case of *toll-thorough*.

[Ante 1404.]

Mr. Justice WILMOT remembered the case of *the Mayor of Nottingham v. Lambert*; and observed, that though that was said there, "that the plaintiffs could not have recovered, for want of shewing that the corporation were lords of the manor," yet it could not alter the judgment in that case.

As to the *consideration*—It was most fully settled in the case of *the Mayor of Exeter v. Trinlet*: it was clearly held, "that in a *toll-thorough*, a consideration must be shewn, because *against common right*: but that a *port-duty* did of itself IMPLY a *consideration*, to support it." This I take to be settled.

[Ante 1406.]

The next question is, "Whether the corporation have shewn a title to receive it." And I think, there is such a title shewn.

THE CROWN has a right to *create* (b) the duty, and to *grant* (c) the duty to another. This prescription is equivalent to such a grant; and pre-supposes it.

Per Cur'.

JUDGMENT for the PLAINTIFFS.

[1408] But Mr. *Willes* prayed leave to withdraw his demurrer, and to have leave to plead: which the court thought reasonable: and Mr. Solicitor General consenting, (though it was asked late, and after a rule "to plead as they would stand by:") the court granted.

LORD MANSFIELD—Well! I hope the precedent of *this* declaration is now sufficiently established.

(b) *Contra*, 2 Inst. 58, 220. 16 Vin. 590. 4 Com. 409. 5 Mod. 54.

(c) *Contra*, 12 Co. 34. 2 Wils. 95. 5 Mod. 55. acc. 2 Rol. Abr. 171. 16 Vin. 578.

STEPHEN and Another *versus* COSTOR and Another.

1763.

Friday, 10th
June 1763.

THIS was a special case reserved at *nisi prius* before Lord Mansfield, at Guildhall.

[S. C. 1 Black.
Rep. 413,
423.]

It was an action upon the case on an *assumpsit*, for WHARFAGE and CRANAGE due to the plaintiffs as wharfingers and possessors of Brook's WHARF in London, for sundry parcels of malt brought to and unloaded at their wharf.

Wharfingers in London are not intitled to wharfage for goods unladed into lighters out of barges fastened to their wharfs.

The declaration set forth, that the plaintiffs are wharfingers, and have been and are possessed of the wharf, &c. and are intitled to a TOLL of 6d. a score for all malt brought to and unloaded at their wharf: and it set forth the act of parliament of 22 C. 2. c. 11. § 21. which enacts that such rates and no other shall be taken for wharfage and cranage as by his majesty, with the advice of the privy council, shall be assessed and allowed to be taken; and obliges wharfingers, under a penalty, not to refuse to suffer any goods or merchandize to be landed or shipped at or from their wharf, at the rates aforesaid.

It likewise set out sections 44, 45, 46 of the said act.

Then it shewed, that an order of council was made on the 1st of March 1674, pursuant to the said act of parliament of 22 C. 2. c. 11. § 21: by which order, malt is rated at 6d. *per* score.

Then it averred, that the defendants were consignees of the cargo of a west-country barge, which came loaded with malt, to the plaintiff's said wharf, and was fastened at and lay there; and that part of the said loading was there landed, and other part, though NOT ACTUALLY LANDED UPON the wharf, was put on board of lighters, whilst the said barge remained fastened to their wharf. And therefore they demanded the duty of 6d. *per* score upon the whole cargo; as well what was so put on board the lighters whilst the barge was FASTENED to their wharf, as what was actually landed UPON it.

[1409]

The case stated for the opinion of the court was as follows: [4 Durn. 581.]

That an order of assessment or allowance of rates to be taken at Brook's wharf or key, mentioned in the declaration, was, on the 1st of May, 1674, made by his late majesty King Charles the second, with the advice of his privy council, in the following words, *viz.*

Whereas by a late act of this present parliament made in the two and twentieth year of his now majesty's reign, intituled "An additional act for rebuilding of the city of London, uniting of parishes, and rebuilding the cathedral and parochial churches within the said city,"

1769. it is by several clauses in the said act contained (amongst
 STEPHEN other things) enacted, that there shall be left a convenient tract of ground all along from London Bridge
 and another to the Temple, of the breadth of forty feet of assize,
 v. from the north side of the river of Thames, to be converted
 COSTOR to a key or public and open wharf; and that no
 and another. lighters, boats or other vessels shall lie before any of the
 said wharfs or keys between the places aforesaid, on the
 north side of the said river, longer than shall be necessary
 for the loading or unloading of goods, without the
 consent and permission of the said wharfingers or proprietors
 thereof; and that it shall and may be lawful for any person or
 persons to load or unload any goods or merchandizes at any
 of the said wharfs or keys; for wharfage and cramage whereof,
 every proprietor, wharfinger or other person concerned shall
 and may demand and receive such rates and no other for the
 same, as shall from time to time be set out, appointed, assessed
 and allowed by his majesty with the advice of his privy council;
 a table of which rates shall be hanged up at every of the said
 wharfs respectively; his majesty, this day present in council,
 having considered of the several rates in the schedule hereunto
 annexed, hath and doth hereby, with the advice of his privy
 council, assess and allow, set out and appoint the said several
 and respective rates therein contained, and doth order and appoint
 that the same shall and may be taken for the wharfage and
 cramage of all such goods in the said schedule also mentioned
 as shall at any time hereafter by any person whatsoever be
 brought unto, shipped off, laden, or unloaded, at Brook's wharf
 or key, adjoining to Queenhithe in London: and that it shall
 and may be lawful for the present owner or proprietor of the
 said wharf, and his heirs and assigns, lessees, tenants or under-
 tenants, from time to time and at all times hereafter, to demand
 and receive from every person or persons that shall hereafter
 bring any goods unto, ship them off, or load or unload the
 same at the aforesaid key or wharf, the several rates for
 cramage and wharfage, which by the aforesaid schedule is
 appointed to be paid for the same, and no other: and to the
 intent that all persons concerned may know what they are
 to pay for the cramage and wharfage of their goods as
 aforesaid, and not to be imposed upon by the wharfinger,
 and made to pay more than their just due; it is further
 ordered that the same be printed and published; and that
 a copy of the said table and rates shall, according to the
 directions of the aforesaid act of parliament, be kept
 constantly hanging up in the most public part and place
 of the said wharf or key, and another at the custom-house
 for all persons

[1410]

concerned to resort to and make use of, as they shall have occasion.

That in the schedule annexed to the said order, and thereby referred unto, malt is rated at sixpence the score.

That the plaintiffs were, during the time in the declaration mentioned, wharfingers, and possessed of *Brook's* wharf or key above mentioned; and intitled to the said rates.

That the defendants were consignees of a loading of malt, which was brought in a west-country barge; which west-country barge was FASTENED and lay at *Brook's* wharf, and unloaded a small part of the said cargo, upon the said wharf; and whilst she lay fastened the other part of the cargo was taken out, and put on board LIGHTERS and never landed on the wharf.

The question is, "whether the defendants are liable to pay the wharfingers, according to the rates mentioned in the order of council, for such part of the cargo as was put on board the LIGHTERS and NEVER LANDED ON the wharf."

It was first argued on *Friday*, the 29th of *April* last, by Mr. *Wallace* for the plaintiffs, and Mr. Serjeant *Burland* for the defendants: and, being a question of great consequence and a new one, it was ordered to stand for further argument; which was made on *Tuesday* last the 7th of this present *June*, by Mr. Solicitor General (*Norton*) for the plaintiffs, and Mr. *Bluckstone* for the defendants,

THE COUNSEL for the plaintiffs argued that the defendants are liable to pay the duty for those goods which were brought to the wharf, and carried away again elsewhere, *without* being actually landed upon the wharf, where the barge was fastened. For, at common law, none could either unload at a wharf, or come to it, and fasten their barge at it, without the consent of its owner: but this statute of 22 C. 2. impowers them to do it without the owner's consent, paying the toll. Therefore the owner of the soil, whose property or at least the dominion of it was taken away by the act, ought to be intitled to all advantages.

They recited and argued from the 21st, 44th, 45th and 46th sections of the act; and insisted that "AT" the wharf must mean something different from "UPON" the wharf: it must include all goods that are brought to the wharf for the purpose of unloading.

The ORDER OF COUNCIL was, they said, a contemporary explanation of the words of the act, and uses equi-pollent words. And as the act and order put it out of the power of the owner of the wharf to hinder the barge-

1763.

STEPHEN
and another
v.COSTOR
and another

[1411]

1763.
STEPHEN
and another
v.
COSTOR
and another

master from *coming* to his wharf *and fastening* the barge there, it is but just that he should receive *compensation* for it, according to the rate settled by the order of council. And this is certainly reasonable and just; because *no other craft* can come to the wharf, *whilst* this barge lies there: and the barge-master has the *whole benefit* of the wharf, as *fully* as if the *whole cargo* was landed *upon it*. And the wharfinger is obliged to keep the wharf in *repair*, as well as servants to *attend it*.

[Vide 16 Vin.
345. (B.)]

They cited 2 Ro. Abr. 123. Title, *Market, Faire, B. Stallage*, pl. 1. "That if a man has a fair, those who have houses adjoining to it cannot open their shops, to sell goods in the fair; but stallage is * due for it."

* I find by

my notes of *Wigley v. Peachey*, et al' Tr. 1732. 5, 6 G. 2. B.R. that Ld. *Raymond* there called this "a monstrous case, that a man should pay a toll for opening his windows and laying goods upon his own ground." (a)

By this method, the barge-master may elude the payment of *any duty at all*; for, he may afterwards land them at a *private* or a *free* wharf, or send them on board vessels lying *below* bridge. This is a *fraud*, upon the face of it.

Wharfage and cranage are to be understood *reddendo singula singulis*. Very few goods, or at least, only very heavy goods, require *cranage*. Here, the duty is payable for *wharfage*, though there was *no* *cranage*.

[1412]

If this was an *unlading at the wharf*, (which we say it is,) then they had a *right* to come and stay there,

(a) S. C. Ld. *Raym.* 1589. *et ib.* 1591. where the above case is cited more fully than here; for here the reason for it is dropped, but is there given for it thus; *viz.* "For they cannot take benefit of the fair without giving the duties which appertain to him who has purchased it: and Ld. *Raym.* in his own report throws out no intimation against the case in *Rolle*, and the counsel on the other side did not deny the stallage to be due, but put their case on another point, *viz.* that if stallage was due, the defendants ought to have an action or proper remedy for that, and not distrain the goods damage feasant, and relied on these two cases, *Cro. El.* 75 and 628, as in point; but note, those cases are that a distress damage feasant, cannot be taken of goods brought into an open market, but even as to that *qv. Strange*, 1129. And, supposing it so, yet it does not follow that stallage might not be due, or under circumstances that trespass might not be maintained, or that a special action on the case might not lie, if there was any fraud in the case."

and we had *no* right to treat them as *tort-feusers*. They might unload the *whole* thus, if they may do so by a *part*.

1763.

STEPHEN
and another
v.

SHIPS are liable to pay *anchorage*, although they do *not actually* cast anchor.

COSBOR
and another

THE COUNSEL for the defendant, admitted, that the order of council does indeed speak of *all* such goods and merchandizes as shall be brought to any such wharf; but they answered, that *that* is carrying it *further* than the act of parliament *authorises*; and is therefore of no validity, so far as it *exceeds* the power given by the *act* itself.

THE ACT was professedly made for the *benefit* of the *public*, and to *restrain* the exactions and unreasonable demands of wharfingers: V. §.21. "*Forasmuch as great exactions, &c.*"

THE COMPENSATION is due for the use of the wharf by *landing* the goods *upon* it; and for *that* use of it, *only*. And we have made a compensation to the owner of the soil, in *proportion to the use* that we have made of it. When the goods are *landed*, he knows *what* to demand: but he has *no right* to come on board the barge to see what *ELSE* may be in it, *besides* what is so landed.

The *rest* of our goods were *not* UNLOADED AT THE WHARF, within the *meaning* of the 4th section; and by the 45th section, we could not lie before the wharf *longer* than was necessary.

THIS question must depend upon the *statute itself*, *only*: it is *not* to be resembled to the cases of fairs and markets, which have *no similitude* to the present case.

Though the barge-master has a right to come to the wharf, yet if he only comes there *colourably*, or misbehaves there *under that pretence*, or *exceeds* his permission, he shall be considered as *coming thither*, with an *ill intention*; and therefore shall be looked upon as a trespasser *ab initio*. Such a subterfuge would be for the consideration of a jury, in an action of trespass.

If the *unloaded* goods were to be construed liable to the duty, they might pay it *over and over* again: for, they must certainly pay where they are landed at any *other wharf*: or if *unloading overboard* on lighters be an *unloading at the wharf*, it is also a *loading at the wharf*, and then a double duty will be payable. So likewise, if fresh goods should be thus loaded *into the barge, out of lighters*. But it is not pretended that the plaintiffs are intitled to *both*.

THE COUNSEL for the plaintiffs replied; to the following effect.

1763.

STEPHEN
and another

v.

COSTOR
and another

THE ORIGINAL RIGHT which was in the *wharfinger* before the act, is a reason for a *liberal* construction of it.

WITHOUT this act, the barge could not have been fastened to our wharf. They have here unloaded a quantity of goods into lighters, *under the security of our wharf*, and by fastening their barge to it; and its lying there *hindered other* craft from coming to it.

The *unlading and lading* out of a barge into a lighter is *only one act of unlading the barge*: and there is *only one single duty* due for it. We are intitled to the *same duty* as if it had been landed on the wharf. As the defendants have had *the benefit* of the wharf, they ought to *pay the duty*.

And though the wharfinger may have no right to come *on board* the barge, to see what else is in it, besides what is landed at his wharf; yet he may, without going on board it, be able to make his charge upon such goods as are put out of it into lighters that come along-side of it.

THE COURT having taken a few days to consider this case;

Lord MANSFIELD now delivered their resolution.

This is an action for *wharfage and crantage duty*, payable to Brook's wharf in *London*.

The case stated mentions an order of council, which recites an act of parliament, made upon the rebuilding of the city of *London* after the fire: upon which act of parliament and order of council, the plaintiffs found their claim to this duty.

The question is, "whether the defendants are liable to pay the duty upon *such part* of the cargo of their barge as was brought to the wharf of the plaintiffs, and *never landed on the wharf*, but only *put on board lighters* and carried away, *WITHOUT being ever actually landed upon the said wharf at all*."

[1414] To go by steps—In the first place, it is not contended on the part of the wharfingers, that any meaning is to be put upon the words "all such goods and merchandizes as shall be *brought to any such wharf*;" unless the goods and merchandizes be actually *loaded or unloaded*, when they are brought thither.

In the next place, it is agreed that if the vessel that comes to the wharf unloads only *part* of its lading upon the wharf, and *goes forward* with the remainder of its lading, in order to be *unloaded elsewhere*; the duty is *only* to be paid for *such part* as is *unloaded there*, and *not* for the remainder which is so carried forwards.

Thirdly—It is not contended, on the part of the wharfingers "that the owner of the vessel or goods is obliged to pay any duty for *unloading the goods into lighters on*

“ the river, *UNLESS he has FASTENED the vessel to the wharf.*” 1763.

Fourthly—The *particular circumstance* stated in the present case, is, that “ *WHILST the vessel was and remained moored and fastened to the wharf, the goods and merchandizes were put on board of lighters brought to lie along-side of her, but NEVER landed on the wharf.*”

STEPHEN
and another
v.
COSTOR
and another

SOME propositions are so plain and clear in themselves, that nothing can render them *more so*: and one is therefore under a great deal of difficulty, in what manner to form any argument upon them.

IF ANY duty of wharfage or cramage is payable to the plaintiffs upon these goods *thus put on board lighters*, it must arise upon this *act of parliament*; on which alone, their claim to any such duty is founded.

And a duty for WHARFAGE and CRAMAGE can not be due where the party has *not* had the use of the *wharf* or the *crane*. WHARFAGE is due for *landing on the wharf*; and CRAMAGE, for the *assistance of the crane*. Anchorage or moorage are very different things.

IF any *injury* has been done to the wharfingers, by *lying before* their wharf, or by *fastening the vessel to it* without right, or in *any other way* whatever, they may have their *remedy* in *another method*; but *not* under this act of parliament, which relates *only to wharfage and cramage*, and gives the duty for *them only*.

It has been urged, on the part of the wharfingers, that “ *at the wharf*” must bear a different meaning from “ *upon the wharf*,” and that every vessel coming to the wharf and landing *some* of its goods *upon* it, and putting *other* part on board a lighter, is liable to the duty for that *other* part which is only put on board of the lighter. [1415]

But they might as well contend that a vessel coming and lying before the wharf, *without even mooring or fastening to it*, should be liable to wharfage.

Clearly, the present case was neither within the idea of the *act of parliament* or the *order of council*; nor *would* the legislature have given the *same* duty for *this*, (if they had really meant to give *any*) as they gave for landing the goods *upon* the wharf: they would certainly have given a *smaller* duty for *this alone*: because the duty must still be *paid again*, whatever wharf they shall *at last* be landed upon. We can not suppose that they will be landed at *private stairs* or *free wharfs*: for, goods consumed in the port of London must, *in general*, be landed upon some wharf where such goods are *usually* landed; and it must be a *very inconsiderable* proportion that one can imagine to be landed *elsewhere*.

But it is said, “ that the owner of the goods or vessel has “ the *benefit of the wharf* given him by the act, even *against*

1763. " *the will of the wharfinger* ; that the wharfinger can not
 STEPHEN " *hinder him from coming to it ; and lying at it, nor even*
 and another " *from mooring and fastening to it ; and that there is no*
 v. " *reason why he should receive all these advantages,*
 COSTOR " *without making a compensation to the owner, who is*
 and another " *obliged to repair and attend his wharf.*"

The answer to this is, that the wharfinger *has his REMEDY for all this*, just in the same manner as he had *before the making* of the act ; if the vessel should *colourably* come and lie before his wharf, or moor or fasten to it *without intention* of loading or unloading upon it ; or if it stays there *longer* than the act permits ; which expressly prohibits the staying longer (without the consent and permission of the wharfingers) * than is necessary to load and unload. And this *colourable* coming thither, with an *unfair* intention, must depend upon *circumstances* ; and is a matter of *fact*, to be tried by a jury : an *action upon the case* will lie for it ; and a jury will consider it in *damages*.

* V. 1. 45.

[1416] BUT *if* there were, in fact, such *inconveniences* as have been suggested, yet arguments *ab inconvenienti* will not hold against the *express words and meaning* of an act of parliament : and both the *words and the meaning* of this act of parliament are *extremely plain and clear*. This action seems to be a new experiment, attempted *contrary* to its sense and meaning.

It has been said, on the part of the wharfingers, " that the *order of council* is a *contemporary explanation* of the " act of parliament."

But the COUNCIL could not *vary or extend* the act : they could *only* take it as they *found* it, and *pursue* it. It was *not* in their power to *impose a duty*.

WE are ALL of us *clear*, that the plaintiffs are *not* intitled to recover the wharfage or cranage duty for *such part* of the goods as were *not unloaded upon their wharf*. And therefore

A NONSUIT must be entered.

Tuesday, 14th
June, 1763.

[S. C. 1 Black.
429.

Ambler, 479.]

Proviso to
suspend pos-
session of ten-
ant in tail till
age of 26.

[See 1 Bosanq.
: 68.

4 Ves. 288.

Fearne, 424.

Vin. Perpetu-
uity, 2 Atk.

473. 2 Ves. 521. 1 Co. 87. a. b. 3 Atk. 775. 3 Brwn 347. 2 Durn. 251.
2 Fearne, 498. 8 Durn. 122. 2 Fearne, 113.]

LADE, BART. *versus* HOLFORD, ESQ. et ux. et al'.

THIS was a case sent hither from the court of Chancery, for the opinion of *this* court.

Sir John Lade, Bart. by his will dated 17th August 1739, devised his manors, &c. to four trustees and their heirs ; and likewise all his leaseholds and copyholds and personal estate, to be laid out in the purchase of land ; UPON TRUST, and to the USE of his cousin JOHN INSKIP, in strict settlement ; with divers remainders over, in strict settlement.

In 1740, the testator died.

After his death John Inskip took the surname of LADE.

In February 1751, he attained his age of twenty-one. In 1756, the said JOHN LADE (afterwards Sir John Lade, Baronet,) attained his age of twenty-six; and married Ann Thrule. In 1759, he died; leaving his wife enceinte of the now plaintiff, Sir John Lade, Baronet.

1763.
LADE
v.
HOLFORD
et al.'.

In the will there is a PROVISIO "that so often as, and
" during such time as the person who for the time being
" (in case the testator had not otherwise directed) would
" have been intitled in possession as tenant for life or tenant
" in tail, should be UNDER the age of twenty-six years,
" then the trustees were to enter, and receive all the rents
" and profits of the real, and all the interest and produce
" of the personal estate: out of which, they were to
" allow, for the maintenance of such tenant for life or
" tenant in tail, sums particularly specified; and all the
" rest was to ACCUMULATE, and be laid out in the purchase of land, and settled to and upon the same trusts
" and uses." (a)

[1417]

On the part of the infant, it was insisted, that he being TENANT IN TAIL, the proviso of limitation to the trustees "to take from him the profits of the estate, for the purpose of accumulation," was contrary to the policy of the law, and therefore VOID.

The defendants, who claimed under limitations in remainder, insisted, it was a good legal limitation; and that the trust for which it was created, ought not to make it void: therefore till his age of twenty-six, the infant could only be allowed, for maintenance, the sums specified in the will.

On the 14th of November 1763, the cause was heard before the Lord Chancellor Henley: who ordered a case to be made for the opinion of the judges of this court, upon the following question, viz.

"Whether the defendant Rose Fuller, the heir at law
" of the survivor of Anne Lade, John Fuller the elder,
" Hugh Offley, and John Fuller the younger, the trustees
" named in the will of the said Sir John Lade the testator,
" did upon the birth of the present plaintiff Sir John

(a) The limits set to executory devises, are not that they shall be confined to twenty-one years after the period of a life or lives in being or in case of a posthumous, to ten months further, which is the utmost limit, and was exceeded in the case at bar; but if the proviso had been, "that so often as and during such time as any son of John Inskip who should be intitled in possession, as tenant in tail, should be under the age of twenty-one years then, &c." it seems the proviso would have been good. *Vid. Forrester, 44. 1 Atk. 581. 1 Vern. 208.*

1763.

LADE

v.

HOLFORD
et al.

" *Lade* (the infant,) take ANY and WHAT estate in the premises devised, by virtue of the proviso in the said "testator's will."

This case was twice argued; first, on Tuesday 26th of last April, by Mr. Serjeant *Hewitt* for the plaintiffs, and Mr. *De Grey* for the defendants; and now, by Mr. *Morton* for the plaintiffs, and Mr. *Wedderburn* for the defendants.

As it was a new case, and the matter of value, the defendants pressed for another argument; and said, counsel of eminence were retained to argue it.

But THE COURT said; the allowance of maintenance was suspended in the mean time, which was a hardship upon the mother; that a third argument would hang it up all the long vacation. If in considering the point, they had any doubt, they would order it to be argued again: if they had none, they ought, in justice, to make their certificate directly.

And on the 17th of June, they made the following certificate.

Question—Whether the defendant *Rose Fuller*, the heir at law of the survivor of *Anne Lade*, *John Fuller* the elder, *Hugh Offley*, and *John Fuller* the younger, the trustees named in the will of the said Sir *John Lade* the testator, did, upon the birth of the present plaintiff Sir *John Lade*, take any and what estate in the premises devised, by virtue of the proviso in the will of the said testator.

Having heard counsel on both sides, and considered this case, we are of opinion that *Rose Fuller*, the heir at law of the surviving trustee in the will of Sir *John Lade*, did NOT take ANY estate in the premises devised, by virtue of the proviso in the will of the said testator. (b)

MANSFIELD.

T. DENISON.

E. WILMOT.

17th June 1763.

(b) The law seems to have been agreeable to the certificate of the judges in this case, and also to the MS. note (a) supra; but if there had been then any doubt the same is removed by the stat. 39, 40 G. 3. c. 48. sec. 1. made to restrain all trusts and directions in deeds or wills, whereby the profits or produce of real or personal estates shall be accumulated, and the beneficial enjoyment thereof postponed beyond the time therein limited; which is so worded as to have removed all doubts about

BROWN *versus* CHAPMAN.

1763.

Tuesday, 17th
June, 1763.

[S. C. 1 Black.
Rep. 427.]

Action lies for
maliciously
suing forth
a commission
of bankruptcy.

THIS was a writ of error from the *Common Pleas*, brought upon a judgment for the plaintiff there, in an action upon the case, for falsely and maliciously suing out a commission of bankruptcy against him: to which, the defendant pleaded the general issue; and a verdict was found there, and judgment given for the plaintiff. Upon which judgment, the defendant below brought this writ of error.

Mr. Serjeant *Hewitt*, for the plaintiff in error, objected to the action, and said it did *not lie*; because the statutes of bankruptcy have provided a particular remedy: and the thing itself (bankruptcy) *did not exist* at common law.

If a statute *makes a new offence*, and *prescribes a particular remedy*, an indictment will not lie. *Cro. Jac.* 643, 644. *pl. 4. Castle's case. Plowd.* 206. a. *Stradling v. Morgan*; on 34, 35 *H. 8. c. 26*. The statute of *Wales* was considered as including a negative. When there is a particular remedy given by act of parliament in a particular case, the act shall not be extended to overthrow and alter the common law, *but in those particular cases.* 11 *Rep.* 59. *Dr. Foster's case*; and *Carter* 36. *Cornwallis v. Hood*.

[1419]

The bankrupt laws are to be considered as *one system of laws*, or *as one statute*; like those concerning leases of ecclesiastical persons, in 1 *Ventr.* 246. *Bayly v. Murin. Wallis v. Hodson*, 24th January 1740, before Lord *Hurdwicke*.

The bankrupt acts are 34, 35 *H. 8. c. 4.* 13 *Eliz. c. 7.* 1 *Jac.* 1. c. 15. and 21 *Jac.* 1. c. 19. 5 *Ann. c. 22.* § 7. (the first material act;). 5 *G. 1. c. 24.* and 5 *G. 2. c. 30.* § 23. which is professedly calculated to answer the very case of maliciously suing out the commission. It begins "*and for preventing the taking out commissions of bankrupts maliciously*, be it enacted, &c." And directs a bond in the penalty of 200*l.* conditioned to prove the bankruptcy: which bond is made assignable to the party grieved, who may sue for the penalty.

And the parliament meant their provision to be an *adequate* provision. It would be unpolitic to make the suing out commissions of bankruptcy *too dangerous*.

the rules of law and equity, if there were any before, either as to the certificate, or the said MS. note in all cases not within any of the provisos in the subsequent sections in the act.

1763.

BROWN
v.CHAPMAN.
[2 Wils. 145.
382.
1 Atk. 144.]

Lord MANSFIELD—There is no clause in that act, that *takes away* the common law remedy; nor that says, “that the party shall not recover *more* than 200l. “damages.”

It can never be for the benefit of trade, that a man should be at liberty to sue out commissions of bankruptcy *maliciously*.

Mr. Ashurst, *contra*, was beginning to speak: but

THE COURT were so clear, that without hearing him, they ruled the

JUDGMENT to be AFFIRMED.

The same day.
[S. C. 1 Black.
427.]

False warranty will vitiate a policy of insurance.

WOOLMER and another *versus* MUILMAN.

THIS was a special case reserved, at *nisi prius* at *Guild-hall*, before Lord Mansfield, for the opinion of the court.

It was an action on the case brought for the recovery of a total loss on a *policy of insurance* made on goods and merchandizes on board the ship *Bona Fortuna*, at and from *North Bergen* to any port or places whatsoever, until her safe arrival in *London*.

It was underwritten thus—“*Warranted NEUTRAL ship and property.*”

The defendant underwrote the said policy for 150l. on the 23d day of *September* 1762.

The defendant having pleaded the general issue, and paid into court the premium received by him for the said insurance, this cause came on to be tried at *Guild-hall, London*, on the 21st day of *May* 1763; before Lord Mansfield: when it was admitted that the plaintiffs had interest on board the ship to a large value, to wit, to the amount of the sum insured.

The ship, with the goods and merchandizes so laden and being on board her, after her departure from *North Bergen*, and before her arrival at *London*, proceeding on her voyage, was by the force of winds and stormy weather wrecked, cast away, and sunk in the seas; and the said goods and merchandize were thereby wholly lost.

It was expressly stated, “that the ship or vessel called the *Bona Fortuna*, at and before the time she was lost, were NOT NEUTRAL property, as warranted by the said policy.”

The question therefore was, “whether the plaintiffs can, under the circumstances of this case, recover in this action.”

Mr. Wallace was for the plaintiff, and Mr. Yates for the defendant. But

Lord MANSFIELD stopped Mr. Yates; and said it was too plain to argue.

This was no contract: for, the man insured *neutral* property: and this was not neutral property. Therefore, we must give

1763.

WOOLMER
and another
v.

MUILMAN.

JUDGMENT for the DEFENDANT.

REX versus DOCTOR HARRIS.

(In the Crown Paper.)

Saturday, 18th
June, 1763.

[S. C. 1 Bl.
430.]

UPON a MANDAMUS to admit and swear CHURCHWARDENS of St. Olave's Southwark.

Lis pendens
not a good
return to a
mandamus.

THE MANDAMUS was directed to DR. HARRIS, commissary of the consistorial and episcopal court of the bishop of Winchester, for the parts of Surrey; setting forth that Henry Griffith and Thomas Garner were in Easter week then last past duly nominated and elected churchwardens of the parish of St. Olave, Southwark, in Surrey, to serve for one whole year then next ensuing, according to the ancient usage and custom of the said parish; and that they had often offered themselves to the doctor, to take their corporal oath as churchwardens, and requested to be by him sworn and admitted into the said place and office: which oath the said doctor refuses to administer to them: the writ therefore commands him, without delay to swear and admit, or cause to be sworn and admitted the said Henry Griffith and Thomas Garner into the said place and office together with all the liberties and privileges thereto belonging and appertaining; or shew cause to the contrary.

[1421]

A like mandamus was also directed to him, to swear and admit David Griffin, Philip Cox, Isaac Applebee and William Strickland into the same office.

He returned, that there were two causes depending before him, which had been afterwards consolidated into one; in which, it was disputed "who were elected churchwardens;" the former, on the promotion of Griffin, Cox, Applebee, and Strickland, asserting themselves to have been duly elected, and praying to be sworn; the latter, on the promotion of Griffith and Garner and two others, against Griffin, Cox, Applebee, and Strickland; and the parties on each side reciprocally denied the others to be duly elected.

By reason whereof he could not, consistently with his duty and the law and practice of the episcopal court, swear or admit or cause to be sworn and admitted the said Henry Griffith and Thomas Garner into the place or office of churchwardens of the parish of St. Olave, Southwark, UNTIL it shall have been judicially determined, in the cause then depending before him, according to allegations given and proofs made thereon, "that the said Henry

1763.

REX

v.

HARRIS.

"Griffith and Thomas Garner WERE DULY ELECTED into "such office." All and singular which said things he submitted to the judgment of the court.

[1422]

The return to the other writ of *mandamus* at the instance of *David Griffin, Philip Cox, Isaac Applebee, and William Strickland*, was the same (*mutatis mutandis*;) only that it added at the end, (after the words "were duly "elected into such office,") "*by a majority of legal "votes.*"

Note—Both the causes stood together, in the crown-paper, for argument; and the like rule was made in *both*: but it was the *former* only that was actually argued; and the fate of *this*, of course, determined the *other*.

Mr. Yates, *pro rege*, argued, that this is a *bad return*. The commissary is only *ministerial*, and is *obliged* to execute the act; whether it be of any validity, or not. The *mandamus* gives *no right*; only a *legal possession*, in order to try it. To prove which, he cited 1 Sir J. S. 609, 610. *Rex v. Simpson*; and 2 Sir J. S. 893, 894, 895, 896. *Rex v. Dr. Wurd*.

But this is a question which this very commissary *himself* is to determine: and it does not at all appear *when he will* determine it.

The defendant can bring no action, *till admission*.

* It was Tr.
8, 9 G. 2.

A latter case in point is *Rex v. Reynell, Tr.* 9 G. 2. B. R.* Upon a *mandamus* commanding him to swear *Lodge churchwarden of Temple Holy Cross in Bristol*; he returned, "that in a suit depending in the bishop's court, "he himself had decreed in favour of *Whitchurch*; and "that an appeal was lodged, and was depending." This return was quashed; and a peremptory *mandamus* awarded.

Mr. Blackstone, for Dr. Harris.—The doctor is totally disinterested. It is his own return, arising from his own difficulties.

[2 East. 83.]

LORD MANSFIELD—It is an indecent return. He has no right to try the question: he can not try the legality of the votes. The king's writ commands him to admit and swear: and he must obey it.

Mr. Blackstone cited 2 *Ld. Raym.* 1008. *the Queen v. Guise*, 3 *Salk.* 88. and 6 *Mod.* 189. (All S. C.) proving (he said) "that *non fuit electus* is a good return;" and likewise "that *special matter* may be returned, in *some "cases.*"

Here are two *cross mandamuses*: and the doctor does not know *which* to obey.

*They were
the only
judges that
were in court.

LORD MANSFIELD and Mr. Justice WILMOT*—
He ought to obey *both*. It is *without prejudice to the right* of either claimant.

Lord MANSFIELD. But he says, "he will determine
"it himself."

1763.

Mr. Blackstone—In Sir T. Raym. 439. *Carpenter's* case, the return is very much like this return: and the reporter says—"we granted a writ to swear *Carpenter*; because "the Ecclesiastical court can not try the custom of "choosing the churchwardens." Which case seems to imply, that though the ecclesiastical judge can not try a custom, yet he may try other matters which the parties have submitted to him.

REX
V.
HARRIS.

Lord MANSFIELD—All the cases cited on both sides, prove this return to be wrong. It would be so, even if he could try it; (which he can not do:) he can not try the legality of the votes.

Mr. Justice WILMOT—These writs give no right: and he can not try the legality of the votes.

Per Cur'.

The RETURN must be DISALLOWED;

And a PEREMPTORY MANDAMUS go.

THE COURT proposed, and the parties consented, to try the right in a feigned issue: and the execution of the peremptory mandamus to be suspended till after the trial: and then the peremptory mandamus to go, "to swear in the victors at the trial;" unless the judge who tries it, shall declare himself dissatisfied with the verdict.

COMBE, Esq. versus Pitt.

Monday, 20th
June, 1763.
and Tuesday
21st ditto.

THIS was an action of DEBT for 1500l. brought by Richard Combe, esq. one of the candidates for member of parliament at the last * election for *Ivelchester*, against Benjamin Pitt, for unlawfully corrupting three several voters to give their votes for Mr. Lockyer and Lord Percival.

[S. C. Black.
Rep. 497
523.]

The declaration was of Michaelmas term, 3 G. 3. with a memorandum referring to Saturday next after the morrow of *All Souls*.

Another action of the same term unless actually prior in point of time,

The defendant pleads, in abatement, that in this same term of St. Michael, before the king at Westminster came one George Lake and exhibited his bill against the defendant of a plea of debt for 400l. for the same cause of action, and for the same identical offences.

[1424] cannot be pleaded in abatement. Vide ante, p. 1335.

The plaintiff replies, that after the committing of the said several offences in his bill mentioned, and long before the day of exhibiting the same bill, and also before the day of exhibiting the said George Lake's bill, that is to say, on the 30th day of June 2 G. 3. he the said Richard Combe, for the recovery of his aforesaid debt, sued forth out of

and post. 1586. and 3 Durn. 361. * V. 2 G. 2. c. 24. s. 7.

1763.
COMBE
v.
PITT.

the court of our lord the now king before the king himself a certain writ of our said lord the now king called a *latitat*, against the said *Benjamin Pitt*, directed to the then sheriff of the county of *Surry*, by which said writ our said lord the now king, commanded, &c. so that he might have his body at *Westminster* on *Saturday next after the morrow of All Souls* then next coming, to answer to the said *Richard Combe* in a plea of *trespass*, and that the said sheriff should then have there that writ: which said writ he the said *Richard Combe* sued forth with intent, &c. And that the said *Benjamin Pitt*, afterwards and before the return of the said writ, to wit, on the 29th day of *July* in the second year aforesaid, was in due manner served with the copy of the said writ, according to the form of the statute in such case made and provided; and that he the said *Benjamin Pitt* afterwards at the return of the said writ, to wit, on *Saturday next after the morrow of All Souls* now last past, appeared in the said court here to the writ aforesaid, &c. and that thereupon the said *R. Combe*, in this present *Michaelmas* term, to wit, on the said *Saturday next after the morrow of All Souls*, according to his intention aforesaid, exhibited his aforesaid bill against the said *Benjamin*, in form aforesaid, for the recovery of his aforesaid debt above demanded. And this he is ready to verify. Wherefore he prays judgment, and that his said bill may be adjudged good; and that the said *Benjamin Pitt* may answer over thereto, &c.

The defendant rejoins, that after the committing of the said supposed offences in the same bill mentioned, and long before the day of exhibiting the said respective bills of the said *Richard Combe* and *George Lake*, that is to say on the said 30th day of *June*, in the 2d year of the reign of our lord the now king, the said *G. Lake* sued forth out of the court of our lord the king, before the king himself (the said court being then and still at *Westminster*, in the county of *Middlesex*) a certain writ of our said lord the kind called a *latitat*, against him the said *Benjamin*, directed to the then sheriff of the county of *Surry*, by which said writ our said lord the now king commanded the then said sheriff, &c. so that he might have his body before our said lord the king at *Westminster*, on *Saturday next after the morrow of All Souls* then next coming, to answer to the said *George Lake*, in a plea of *trespass*, and that the said sheriff should then have there that writ. And that afterwards, and before the return of the said writ, and before the said *Benjamin* was served with a copy of the said writ so sued out by the said *Richard*, or had any notice of that writ being sued out or intended to be sued out, to wit, on the 7th day of *July*, in the 2d year aforesaid, he the said *Benjamin* was served with a copy of the said writ so sued by the said *George Lake*, with an *English* notice at

[M25]

the bottom thereof, according to the form of the statute in such case lately made and provided; and that in obedience to the said writ, he the said *Benjamin*, according to the course and practice of the said court, at the return of the said writ so sued out by the said *George Lake*, to wit, on *Saturday* next after the morrow of *All Souls* now last past, appeared in the said court here, to the said writ so sued out by the said *George Lake*; and that thereupon the said *G. Lake*, in the said term of *St. Michael*, to wit, on the *Saturday* next after the morrow of *All Souls* now last past, exhibited his aforesaid bill against the said *Benjamin* in form aforesaid, for the recovery of the supposed debt by him demanded as aforesaid. And this the said *Benjamin* is ready to verify. Wherefore, as before, he prays judgment of the said bill of the said *R. Combe*, and that the same may be quashed, &c.

1763.
COMBE
v.
PITT.

The plaintiff surrejoins, that by the *course and practice of this court*, writs of *latitat* sued out after the end of any term are *tested* as of the term next preceding the time of their being so sued out: but he avers that the said writ of *latitat* above alledged to have been sued forth out of the said court here by the above-named *George Lake*, although the same was tested on the 30th day of *June* aforesaid, in the said 2d year of his present majesty's reign, being the last day of *Trinity* term in that year, WAS REALLY AND IN FACT sued forth on the THIRD day of *July* in the same year, and NOT BEFORE; and that the aforesaid writ of *latitat* which he the said *Richard* sued forth out of this court as aforesaid, and which was tested on the 30th day of *June* aforesaid in the said second year of his present majesty's reign WAS REALLY AND IN FACT sued out by the said *RICHARD* against the said *Benjamin* for the cause aforesaid, long before the said writ of *latitat* in the aforesaid rejoinder mentioned, was really and truly sued out by the said *George Lake*, that is to say, on the FIRST day of *July* in the said 2d year of his said majesty's reign, to wit, at *Ivelchester* aforesaid: and that he the said *Richard* afterwards *with all convenient speed*, to wit, on the day and year in the above replication for that purpose mentioned, did serve a copy of his said writ upon the said *Benjamin Pitt*, and on the appearance of the said *Benjamin* thereto exhibited his aforesaid bill, and declared thereupon against the said *Benjamin* for the cause and in the manner aforesaid: and this the said *Richard* is ready to verify. Therefore he prays judgment that his aforesaid bill may be adjudged good, and that the said *Benjamin Pitt* may answer over thereto.

[1426]

To this surrejoinder the defendant demurs specially; and shews for cause, 1st. that it *does not sustain the above replication* of the said *Richard*; but it is a *departure* therefrom, in this, that by the said replication the said

1763.
COMBE
V.
PITT.

Richard, in order to maintain a priority of suit, hath pleaded and insisted, "that he sued out a writ of *latitat* in this cause against the said *Benjamin Pitt* on the 30th day of *June* in the 2d year of the reign of his present majesty;" and yet by his said surrejoinder he hath insisted "that such writ of *latitat* was sued out at a different time, to wit, on the first day of *July*, in the 2d year aforesaid;" and also for that the said *Richard* hath not traversed or denied the service of the said writ of *latitat* sued out by the said *George Lake*, to be before the service of the said writ of *latitat* sued out by the said *Richard*, as he the said *Benjamin* hath by his said rejoinder above alledged: and the said surrejoinder is in other respects improper and insufficient.

The plaintiff joins in demurrer.

Mr. *Dunning* argued it for the defendant.

This is an action (laid in *Somersetshire*) for corrupting voters at the election of members of parliament for *Ivelchester*. The declaration is of *Michaelmas* term, and begins with a memorandum referring to *Saturday* next after the morrow of *All Souls*.

The defendant pleads, in abatement, an action brought for the very same matter and offence, by one *George Lake*, in the same term.

The plaintiff replies, that before the day of exhibiting *Lake's* bill, that is to say, on the 30th of *June*, he the plaintiff sued out a *LATITAT* against the defendant, returnable on *Saturday* next after the morrow of *All Souls*, and that the defendant was duly served with a copy of it, and appeared, &c. and thereupon, the plaintiff exhibited his bill against him, &c.

[1427] The defendant rejoins, that on the said 30th of *June*, *Lake* sued out a *latitat* against him, returnable on the same *Saturday* next after the morrow of *All Souls*; and that before the defendant was served with a copy of the plaintiff's writ, or had any notice of it, to wit, on the 7th of *July*, he was served with a copy of *Lake's* writ; and that *Lake*, upon the defendant's appearing at the return of it, exhibited his bill on the *Saturday* next after the morrow of *All Souls*.

The plaintiff surrejoins, that by the course and practice of this court, *latitats* sued out after the end of a term are tested as of the preceding term: but that *Lake's latitat* was in fact sued out on the THIRD of *July* and not before: and that his the plaintiff's *latitat* was in fact sued out on the FIRST of *July*, and with all convenient speed served upon the defendant, and proceeded upon as soon as the defendant appeared to it as aforesaid.

To this surrejoinder we demur: and shew for cause, "that the surrejoinder does not sustain the replication,

"but is a *departure* from it;" and "that the plaintiff has
 "not therein traversed or denied the service of Lake's
 "intitl to be PRIOR to the service of his own."

1763.
 COMBE
 V.
 PITT.

First—Here does *not appear* such a *priority of suit*, on the part of the plaintiff, as is necessary to ATTACH THE RIGHT OF ACTION *in him*. BOTH WRITS are *tested* on the same day, and *returnable* on the same day: and BOTH DECLARATIONS are supposed to be of the *first day* of the term; which is to be taken as only *one day*.

In *qui tam* informations for the same offence, where both are exhibited upon the same day, there is *no precedency* of suit, to attach the right of suit in *either* informer: and therefore the court can give judgment for *neither*; but *both* shall be *barred*.

This is expressly resolved in the case of *Pys v. Cooke*, 14 *Juc.* 1. reported in *Morre* 864, and *Hobart* 128. And the former report resembles it to the case of two *replevins* by two persons at one time, for one taking: the defendant shall answer *neither*.

It is true, that in a case of *Hutchinson* against *Thomas*, Tr. 27 *Car.* 2. as reported in 2 *Lev.* 141. in an information for usury, the memorandum was of *Michaelmas* term, and the defendant pleaded "*quod ante exhibitionem hujus informationis, scilicet termino sci Michaelis* (the same term) [1428]
 "another person exhibited an information also against
 "him for the same usury, and obtained judgment against
 "him." Upon which, the informer demurred, and had judgment; for, both informations, *as there pleaded*, refer to the *first instant* of the same term: but *if* another information *was* exhibited *before*, in the same term, he should have pleaded "that this information was exhibited *such a day* in the term; and that at *another day*, before, in the same term, another information was exhibited, and judgment thereupon obtained." And there is also a case (very ill reported) in 2 *Sir J. S.* 1169. *Jackson qui tam, &c. v. Gisling*, Tr. * 15 *G.* 2. In debt on the statute of 15 *C.* 2 *c.* 8. for selling fat lambs alive, the defendant pleaded, "that in the same term another informed against
 "him and recovered:" and on demurrer, it was held ill, according to 2 *Lev.* 141, "*because he did not* set out the *days* on which *each* bill was exhibited, that so the court might judge of the priority." This is the whole of *Sir John Strange's* report of the case.

* N. B. It was
 Tr. 16 *G.* 2.
 See the note
 just below.

But there is a *distinction* between pleas in *abatement*, and pleas in *bar*. Pleas in *bar* must *shew* the priority; because the right of action *attaches by* the priority: but in pleas in *abatement*, it is sufficient to shew, "that the two suits were commenced upon the same day."

And it appears by a fuller and more accurate MS. report of the case of *Jackson v. Gisling* (which he read

1763.

COMBE

v.

PIRT.

† It may be

going too far to say, that "this distinction was established in that case." But it was taken or at least hinted at, by Lee Lord Chief Justice, Chapple, and Denison. And that case was a plea in bar; though it is not directly so expressed by Sir J. S.

N. B. Sir J. S. or rather his editor, has mistaken the year: for it was determined in Tr. 1742. 16 G. 2. not 15 (as he reports it.)

Therefore when both actions are commenced at the same time, each may be pleaded in *abatement* of the other.

And here, *both writs* have the same *teste* and the same *return*; and *both declarations* refer to the same day.

We have therefore pleaded in *abatement*, not "that *Lake's* action was *prior* to the plaintiff's;" but "that both were commenced at the same time:" in which case, we were *not* obliged to *answer* to *either*.

[1429] Their replication indeed alledges, "that *their latitat* was sued out on the 30th of June." But

Our rejoinder alledges the *very same thing* concerning *our latitat*.

So that the case is *brought back*, just to what it was *before*, as to *priority*.

Then they surrejoin "that their's was in fact sued out on the *first of July*: and *our's*, not till the *third*:" which gives *them* a priority of *two* days.

And I own, that it is now settled "that the *true time* of suing out the *latitat* may be shewn, whenever it is material, in answer to a plea of the *statute of limitations*, notwithstanding the *teste*:" so was the determination in the case of * *Johnson v. Smith*, P. 33 G. 2. B. R.

* Vide ante,
p. 950 to 968.

And in cases of pleas of *tender*, I admit, likewise, "that the *day of the tender* may be shewn."

But *neither* of *these* cases, (on pleas of the statute of limitation or pleas of tender,) apply to the *present case*; which is a *penal action* brought by a *popular informer*.

Such a construction was very right in *those cases*; because it tended to *support solid justice*, and to *prevent a wrong* which would there have arisen from legal fiction.

But though *remedial laws* are to be construed *liberally*, yet *penal laws* are always construed *strictly*. A *common informer* shall not be at liberty to quit the *teste*, and avail himself of the real time: even *forms* shall not be dispensed with, to aid *popular prosecutors*.

In the case of * *Culliford v. Blandford, Pasch. 4 W. & M. B. R. Carthew, 234. Holt* Chief Justice differed from the other three judges, and took this *distinction* between a *civil* action and an action for a *penalty* given by a statute, "that in the *former* case, the suing out a *latitat* within

" the time and continuing it afterwards will be sufficient;
 " but in the other case, if the party proceeds by bill, he
 " ought to file his bill within time, that it may appear
 " so to be upon the record itself." The plaintiff indeed
 had judgment: but afterwards a writ of error was
 brought, in that case.

1763.
 COMBE
 v.
 PITT.

It appears upon the pleadings in the present case,*
 " that our writ was served on the 7th of July, and their's
 " was not served till the 29th." So that we have *three weeks*
priority of service: which shall take place of the two
 days priority of their pocket-writ, which they only took
 out, but *did not serve*. It would be hard if this pocket-
 priority should be a ground for our paying the penalty
twice over.

[1430]
 * Vide ante,
 p. 1424, 1425.
 in the replica-
 tion and re-
 joinder.

It may perhaps be objected, " that both writs were
 " returnable at the same time."

They were so. And supposing the *return* of the writ
 to be the *commencement* of the action, yet † (as it was
 said in the case of *Jackson v. Gisling*.) if both are at the
 same time, the court *can not give priority to either*: but
 either defendant may *plead in abatement*.

† This was ex-
 pressly said,
 both by Lord
 Ch. J. Lee,
 and by Mr.
 J. Chapple.

Secondly—As it appears upon the *replication* and *re-joinder* both, " that the plaintiff had *no priority* of suit;
 " but that *both* writs were sued out on the very *same day*,
 " viz. on the 30th of June." The plaintiff's *surrejoinder*
 is *repugnant to the replication*, and a *departure* from it, in
 alledging " that his *latitat* was in fact sued out on the
 " *first of July*." And we have shewn this for a cause of
 demurrer.

Where the *time* is *material*, (as in this case it is,) a
 departure from the time before alledged is a defect in
substance.

This was solemnly determined in the case of *Cole v. Hawkins*, H. 3 G. 1. B. R. *Stra.* 21.

(Of this case I have a MS. note (taken before
 my own time :) and the determination was " that
 " in an action upon the case on a *parol* promise,
 " the *time* of the promise, laid in the declaration,
 " is *not material*: but when the defendant by his
 " plea *makes it so*, the plaintiff may answer the
 " plea, and it shall *not* be a departure." The same
 thing was determined in a later case, of which I
 have a note of my own, in *Tr. 1, 2 G. 2. Matthews*
v. Spicer, 2 *Stra.* 806. upon a *tender*: and a dis-
 tinction was taken between the case of a *common*
assumpsit, where the day is alledged only for *form*;
 and a *note*, where the day is *material*, and an essen-
 tial part of the agreement, from which the plain-
 tiff can not vary.)

Mr. Yates, *contra*, for the plaintiff.

1763.
COMBE
v.
PITT.

The material question is, "whether *our* action, or "*Lake's* friendly one, be prior."

It is incumbent on the defendant, to shew that the action he pleads *is prior* to the plaintiff's.

The case of *Jackson, qui tam, v. Gisling*, shews this; and so does 2 *Hawkins's P. C.* 275. § 63.

And there is *no reason* for any distinction between pleas in *bar* and pleas in *abatement*: the same reasons *equally* hold in *both* cases.

The case of *Johnson v. Smith* proves, that the *true* time of suing out the *latitat* *may* be shewn by the *plaintiff*: and we *have* shewn that both writs were *tested* on the *same day*; both *returnable* on the *same day*; both *declarations* on the *same day*; and that *our's* was *IN FACT* *sued out two days before Lake's*. And the *suing out* the process is the *commencement* of the suit, and is *equally* so, and with *equal* effect, in a *qui tam* action by a common informer, as it is upon a plea of the statute of *limitations*, or a plea of *tender*. This appears by the opinion of the three judges (against Lord Chief J. *Holt*) in the case of *Culliford qui tam, v. Blanford, Carthew*, 233, 234. So that *we have* the *priority* of suit, and are guilty of *no laches*; for, we *served* it with all convenient speed, and proceeded upon it as soon as the defendant appeared. Consequently, *our's* is not to be called a *pocket latitat*; nor does *their* priority of *service* make any difference in their favour.

If Mr. *Dunning's* argument should prevail, it would be impossible to prevent such collusion between defendants and their friendly prosecutors, as must baffle all *real* prosecutions upon this statute.

Perhaps, if both were commenced upon the *very same* day, one *might* be pleadable to the other.

Secondly. As to the DEPARTURE.

The notion of a DEPARTURE is where a man shews and relies upon another matter *differing* from and *contrary* to his former allegation. But here is *no* repugnancy or departure; for, we *adhere* to our former allegation, as to the *teste* of the writ, pursuant to the course and practice of the court; and then specify the day when we *really* and *in fact* sued it out. And this is *no departure*, when it is *in answer* to the defendant's plea, which has *made* the time *material*, when it was *not so before*.

Mr. *Dunning*, in reply.

Mr. *Yates* disputes the distinction which I make between pleas in *abatement*, and pleas in *bar*. But it is a *just* one; and I had the report of the case of **Jackson v. Gisling*, where it was established, from the † gentleman who argued that case.

It cannot be right or reasonable, that *each* plaintiff

* V. ante, p. 1428.

† Norton argued it pro quer: Gundry, pro def.

should recover against the defendant, for the very *same offence*; and yet, *that* is the consequence of Mr. Yates's argument.

He says indeed, "that *Lake* is a *friendly* informer." But *how* does that *appear*? Or *how* can the court take *judicial notice* of that? Both informers appear in an *equal* light to the court; and they will aid *neither* of them.

Secondly—"That this surrejoinder is a *departure* from "the replication," is manifest upon the *face* of it: it is quite *repugnant* to it.

The *replication* does not say one word about the *teste* of the *latitat*: it does not mention the *teste* at all, but only alledges "that it was *sued forth* on the 30th of June." The *surrejoinder* avers it to have been "*sued forth* on the 3d of July, and *not before*." Can *any* thing be *more repugnant*?

A second argument being proposed,

LORD MANSFIELD said, that it had been extremely well argued by the gentlemen on both sides: who had both of them argued like lawyers, and had not said a word too much or too little.

CUR. ADVIS. till to-morrow morning.

And the next day, *Tuesday*, the 21st.

LORD MANSFIELD delivered their opinion.

HE said it was unnecessary to go into any of the pleadings *subsequent* to the *plea*, if the *PLEA* itself was *bad*: and they were all of opinion, "that *this plea is a bad one*."

It is a *plea in abatement*, shewing "that *another* action was brought against the defendant, *in the same term*, by "*another* person for the *same offence*:" and *this is all*, without any thing more. Whereas he *ought* to have shewn, "that the *RIGHT of action* was ATTACHED in "*some other person, before* the present plaintiff's action "*was commenced*." And Mr. Dunning's own two cases prove this doctrine.

THAT of *Hutchinson v. Thomas*, in 2. Lev. 141. was an information for usury. The memorandum was of *Michaelmas* term. The defendant pleaded "that *ante exhibitionem* "*informationis, scilicet* the same term, another person "*exhibited* an information also against him for the same "*usury*, and obtained judgment against him." Upon which, the informer *demurred*, and had judgment: for, both informations, *as there pleaded*, refer to the first instant of the same term. But *if* another information was exhibited *before*, in the same term, the defendant *should* have pleaded, "that the information pleaded to was "*exhibited such a DAY* of the term; and that *at another*

1763,
COMBE
V.
PITT,

[1433]

1763.
COMBE
v.
PITT.

" DAY before, in the same term, another information was exhibited, and judgment thereupon obtained."

And *Jackson, qui tam, v. Gisling*, was a plea, " that in the same term, another informed against him and re-covered:" and, on demurrer, it was holden ill, according to 2 Lev. 141. because he did not set out the days on which each bill was exhibited, that so the court might judge of the priority.

Therefore, notwithstanding the general fiction " of the whole term's being but one day," yet when the priority of action becomes essential and necessary to be ascertained, the particular day must be shewn.

Mr. Dunning has fairly stated these two cases, which are against him: but he distinguishes between pleas in BAR, and pleas in ABATEMENT: and he admits these cases, as being pleas in BAR; but says, that where both actions are brought at the same time, it ought to be (as it is here) pleaded in ABATEMENT, and that such a plea in abatement is good. And he has cited a manuscript note of the case of *Jackson v. Gisling*, by which (he says) it appears that* that case really turned upon such a distinction between pleas in bar and pleas in abatement.

* V. ante,
p. 1428.

BUT there can be no reason or foundation for such a DISTINCTION: for, in both cases, it is equally necessary to set out the particular day. If the particular day be not specified, the whole term will be considered but as one day.

[1434] The case is intelligible, as it is reported by Sir J. S. and my brother Denison says, it is* rightly taken.

* If it is rightly taken,

I am sure it is not fully taken: at least, I know that my own note of it, employs twice as many pages as his does lines.

A case was cited from *Hobart* and from *Moore, Pye v. Coke*, 11 Jac. 1. to prove, that " where two informations are exhibited on the same day, the defendant needs not to answer either:" and Mr. Yates seemed to † con-
cede, " that if both were, in fact, brought upon the very same day, one might be pleaded to the other."

† V. ante,
p. 1431.

BUT though the law does not, in general, allow of the fraction of a day, yet it admits it in cases where it is necessary to distinguish. And I do not see why the very hour may not be so too, where it is necessary and can be done: for, it is not like a mathematical point, which cannot be divided. However, this is not necessary to be determined in the present case.

Upon the whole, we think the PLEA bad, on the authority of the two cases in *Levinz* and *Strange*: and

therefore there is no need to go into any of the subsequent pleadings.

Let the defendant ANSWER OVER.

V. post. 1586. (under *Monday* 19th November 1764.)

1763.

COMBE

V.

PITT.

REX versus SIR FRANCIS-BLAKE DELAVAL, WILLIAM BATES, and JOHN FRAINE. Wednes. 22d June 1763.

[S. C. 1 Black: 410,439.]

ON shewing cause (in the last term, viz. on *Monday* 16th *May*) why an *information* or *informations* should not be exhibited against the defendants, for certain *misde-meanors*;

Information for fraudulently assigning a female apprentice for the purpose of prostitution.

And also upon Sir Francis's producing ANNE CATLEY in court, in obedience to an *habeas corpus* directed to him for that purpose;

[6 Durn. 628.]

The charge against them was, that the defendants had joined in an unlawful *combination and conspiracy*, to remove this girl, an infant of *about* eighteen, out of the hands of the defendant Bates (a musician) to whom she was bound an apprentice by her father, (a gentleman's coachman,) without the knowledge or approbation of the said Catley her father, and to place her in the hands of Sir Francis, for the purpose of PROSTITUTION.

For which purpose (as it was insisted,) she was discharged by Bates, her master, from the indentures of her apprenticeship to him, in consideration of 200l. (the penalty of them,) paid to him by Sir Francis; and was then bound, by the usual indentures of apprenticeship, to SIR FRANCIS: and MR. FRAINE was the attorney who was concerned in the transaction, so far as to make all these several indentures, and also to draw up an agreement between Sir Francis and Bates, "that Bates should have the profits of an engagement or contract he had entered into for her singing at *Marybone*, and be secured against the non-performance of that contract." The girl was now notoriously kept by Sir Francis Delaval; and actually resided in his house, and publicly rode out on his horses, attended by his servants.

As to the INFORMATION—

THE COURT adjourned the consideration of the matter till the first of the present term. For

LORD MANSFIELD said, that if here really has been a CONSPIRACY to seduce this girl, (which is the foot upon which this court are to take it up,) he and his brethren had some doubt "whether the father and mother were not concerned in it, as well as the rest." Therefore let the rule be enlarged till the first day of next term: and let the father and mother, in the mean time, give an answer to the matters which are charged upon them in



1763. the affidavits that have been read on the part of the
 REX defendants.

v.
 DELAVAL,
 et al.

As to the HABEAS CORPUS—

His LORDSHIP said, that the three principal cases that have occurred since Queen Ann's time that are applicable to the present case, were

[2 New Abr. Mrs. *Turberville's* case (*Rex v. Clarkson et al.* 1 Sir J. S. 444.) in *Trin.* 7 G. 1. in this court;
 682.]

Frances Howland's case (*Rex v. Mary Johnson*, 1 Sir J. S. 579. and 2 Ld. *Raym.* 1334.) in *Hil.* 10 G. 1. B. R. and

James Smith's case (*Rex v. Penelope Smith*, 2 Sir J. S. 982) in *Trin.* 7, 8 G. 2. B. R.

[1436] And he thought that what was *done* by the court, in every one of them, was *right*: though he did not agree with the *sayings* that were reported in the books to have been made use of in determining them.

[4 Burr 1990.] IN cases of writs of *habeas corpus* directed to private persons, "to bring up *infants*," the court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are *not bound to deliver them over* to any body nor to give them any *privilege*. This must be left to their *discretion*, according to the circumstances that shall appear before them.

There is a *privilege REDEUNDO*; unless the court should see ground to declare the contrary.

In the three particular cases which he had mentioned, all that was *actually done*, he said, was *RIGHT*: though he did *not* agree with all that was *said*.

In the first of these cases (*Rex v. Clarkson et al.*) the infant was a marriageable young lady, who lived with her guardian. A man claimed her as his wife: she denied the marriage. The court could not try the marriage by affidavit; and they could not deliver her to the man as *her husband*, without allowing the marriage: She chose to remain with her guardian: and the court, upon being informed "that the man had a design to seize her," sent a *tipstaff home with her, to protect her*.

In the second case (*Rex v. Mary Johnson*), the child was *too young* to judge for itself: she was not more than nine or ten, or, as some accounts say, * *six years old*; but certainly *not old enough* to exercise any judgment of her own. And there was a *legal guardian* appointed by the will of her *father*: and therefore it was *right* to let the *legal guardian* take her, as she was *too young to judge for herself*. The guardian appointed, in that case, by the *spiritual court* was nothing at all: for they appoint *any body* guardian in that court; for the mere purpose of appearing.

In the third case (*Rex v. Penelope Smith*), the child

* My own note. (and I was in court and saw her) says "about six."

wanted but six weeks of fourteen. And that case was *determined right*, (barring the *dictums* that were used in it:) for the court were certainly *right* in *refusing* to deliver the infant to the *further*; of whose *design* in applying for the custody of his child, they had a *bad* opinion.

1763.

REX
V.DELAVAL,
et al.

The true rule is, "that the court are to judge upon the "*circumstances of the particular case*; and to give their "*directions accordingly*."

[1437]

In the *present* case, there is *no reason* for the court to deliver her to her *father*. She has sworn "to have received *ill usage* from him, before she was at all put out "apprentice;" and whilst she was with *Bates* her master, it appears that her father seldom or ever came near her, or ever gave her either advice or reprimand. It is even suspicious "whether the father and mother were not "*parties to the conspiracy*;" and "whether the father does "not carry on this prosecution in hopes of *extorting money* "from the defendants."

Let the girl therefore be *discharged from all restraint*, and be *at liberty to go where she will*.

And whoever shall offer to meddle with her *redeundo*, let them take notice "that they do it at their *peril*."

But I see no reason, in *this* case, to send an officer with her, to protect her: upon a *mere apprehension or supposition* "any body will behave impropely upon the "*occasion*."

The *affidavits* of the girl's father and mother having been read yesterday, Lord MANSFIELD took them home to revise and consider them, (together with the rest of the affidavits formerly read,) till this morning: by which *affidavits now read*, the *further* seemed to me to have very fully *exculpated* himself from all suspicion of blame; but the *mother* was acquainted with the amour between Sir *Francis* and her daughter, whilst she and her daughter lodged together in or near *Covent-Garden*, and before her daughter's going to *Bath*, as well as after her return, though she never acquainted her husband at all with her knowledge or suspicion of it.

Lord MANSFIELD now delivered the opinion of the court.

This is a motion for an information against the defendants for a CONSPIRACY to put this young girl, (an apprentice to one of them,) into the hands of a gentleman of rank and fortune, *for the purpose of prostitution*; contrary to *decency* and *morality*, and *without* the knowledge or [15 Vin. 159.] approbation of her father; who prosecutes them for it, and has now *cleared himself* of all imputation, and appears to be an *innocent and an injured* man.

The fact, uncontroverted, is this—

A *female infant*, then about *fifteen*, was bound appren-

1763.
 REX
 V.
 DELAVAL
 et al^s.

tice by her father to the defendant BATES, a music-master; the girl appearing to have natural talents for music. The father became bound to the master in the penalty of 200l. for his daughter's performance of the covenants contained in the indenture. She became eminent for vocal music; and thereby gained a great profit to BATES her master. During her apprenticeship, being then about seventeen, she is debauched by Sir Francis Delaval, whilst she resided in the house of Bates's father; as Bates himself was a single man and no house-keeper. In April last, BATES her master indirectly assigns her to Sir Francis, as much as it was in his power to assign her over: and this is done, plainly and manifestly, for bad purposes. BATES at the same time releases the penalty to the father, but without the father's application or even privity; and receives the 200l. from Sir Francis, by the hands of his taylor; who is employed to pay it to Bates, and also enters into a bond to BATES, to secure to him the profits arising from the girl's singing this summer at Marybone. And then she is indentured to SIR FRANCIS DELAVAL, to learn music of HIM: and she covenants with him, both in the usual covenants of indentures of apprenticeship, and likewise in several others, (as "not to quit even his apartments,") &c. These ARTICLES between the parties are signed by all but the father: and a bond is drawn from him, in the penalty of 200l. for his daughter's performance of these covenants (which he never executed.) And the girl goes and lives: and still does live with Sir Francis, notoriously, as a kept mistress.

Thus she has been played over, by BATES, into his hands, for this purpose. No man can avoid seeing all this; let him wink ever so much.

I remember a cause in the Court of Chancery, wherein it appeared, that a man had formally assigned his WIFE over to another man: and Lord Hardwicke directed a prosecution for that transaction, as being notoriously and grossly against public decency and good manners. And so, is the present case,

It is true that many offences of the incontinent kind fall properly under the jurisdiction of the Ecclesiastical court, and are appropriated to it. But, if you except those appropriated cases, this court is the custos morum of the people, and has the superintendency of offences contra bonos mores: and upon this ground, both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here.

However, besides this, there is, in the present case, a CONSPIRACY and CONFEDERACY amongst the defendants: which are clearly and indisputably within the proper jurisdiction of this court.

P. 10160. [1439
 21 Feb 1763 p. 1438
 2 Bac ab 141.

And in the conspiracy they were *all three* concerned.

BATES, the master, clearly *knew* of the connection between Sir Francis and his apprentice, in *February*: but he gave no notice at all about it, to her father, till a considerable time *after* he knew it himself; and *at last*, neither tells nor hints to him any thing further than that she had been seen riding in the park attended by a servant of Sir Francis Delaval's, and that she neglected her business and his instructions; and recommended her mother's taking a lodging for her and lodging with her. In *April*, he enters into this transaction with Sir Francis; who is to *pay him the penalty* of the original indentures, and *then* to *have the girl*. Yet of all this, he gives no notice to her father. BATES's *own affidavit* is *highly improbable*: and though the *girl* swears, in *her's*, to *exculpate* BATES as well as Sir Francis Delaval, yet it is plainly discoverable from what she swears, "that BATES's account is *not* a "true one." BATES therefore ought clearly to be included in the rule for an information.

Then as to FRAINE, the attorney—Though I never heard any imputation upon him before, yet in *this* instance he has certainly acted *inconsistently* with the *duty of his profession*, and that *chastity of character* which is incumbent upon an attorney always to support. He has *drawn and prepared* all these instruments; and the indentures whereby this girl, already bound to Bates, binds herself apprentice to Sir Francis Delaval, to be taught music by him; and all the covenants contained in it; and was *privy to the compensation* that Bates received from Sir Francis. So that it was impossible for him to be ignorant of the *real intention* of this transaction: he could not imagine that she *really* bound herself to Sir Francis to be taught music by him; but must undoubtedly have been *conscious of the true purpose* for which these deeds and writings were calculated. He therefore ought likewise to be *included* in the absolute rule for an information.

Then as to SIR FRANCIS himself, there can remain no doubt. [1440]

Therefore let the RULE be ABSOLUTE
against ALL * THREE.

* Note—

The counsel for the prosecutor did not, upon the original motion, pray any rule against the *tylor*; suspecting that he had acted rather under a kind of *compulsion*, than ill intention or design.

REX *versus* BURBAGE.

MR. Ashhurst, on behalf of the prosecutor, moved for a *habeas corpus ad testificandum*, to carry Thomas prisoner ad test. refused under special circumstances.

1763.

REX

V.

DELAVAL.
et al.'

Same 22d
June, 1763.

Habeas cor.
to remove a

1763.

REX

v.

BURBAGE.

Haydon, a prisoner in EXECUTION in the King's Bench prison for a *misdemeanor*, down to the next assizes for the county of *Worcester*, against the defendant; upon an affidavit of his being a *material* witness.

But Lord MANSFIELD, though he agreed, "that" (in general) a *habeas corpus ad testificandum* will lie, to "remove a person in execution, to be a witness," yet thought the *present* application to be a *mere contrivance*.

† V. ante,
p. 1387. Rex
v. Thomas
Haydon, Sa-
Saturday 7th
May, 1763.

This *Burbage* is indicted for *perjury* in swearing the *very* oath upon which this † *Thomas Haydon* was convicted of the offence for which he is now imprisoned: so that it seems difficult to account for his being a material witness in the cause. But even admitting him to be so, there is no great inconvenience in trying it at the next following assizes: at which time this man's imprisonment will be at an end.

Per Cur'.

TAKE NOTHING BY THE MOTION.

The end of Trinity Term, 1763. 3 G. 3.

† Mr. Just. FOSTER was absent *all* this term; and died on the first day of the following term, viz. *Monday*, the 7th of November 1763.

MICHAELMAS TERM,

1441-1442

4 GEO. III. B. R. 1763.

In the evening this *Monday* the first day of this term, *Monday 7th*
about nine o'clock, * died Mr. Justice *Forsen*, *Nov. 1763.*
third judge of this court, aged about 74. * *Memoran-*
dum—There
were only
three judges
of this court
during the
whole term.

RIGHT, on the demise of **FRANCIS BASSET, Esq. versus**
THOMAS and another.

Tuesday, 15th
Nov. 1763.

THIS was a case reserved upon an ejectment tried at
the western summer-circuit in 1761. It turned upon
the construction of a power: and the question was,
“ whether the *power* was or was not *well executed*.”

[*S. C. 1 Bl.*
416]

At the assizes, there was a verdict for the plaintiff, to be liberally
subject to the opinion of the court, on the following construed.

John Pendarvis Basset, being seised in fee, in consi-
deration of an intended marriage between him and Mrs.
Anne Prideaux, conveyed to trustees and their heirs, to
the use of himself and his heirs till the marriage; then,
of himself for life; remainder to the trustees, to preserve
contingent remainders; and after his own death, then
remainder to secure a rent-charge to his intended wife for
her life; remainder, to the first and other sons of the
marriage, in tail male; remainder, to such uses as he
should by deed or will appoint; remainder, for want of
such appointment, to the heirs of his body, in tail male;
remainder to his brother *Francis Basset*, the *lessor of the*
plaintiff, for life; remainder to the first and other sons of
the said *Francis Basset*, in tail male: remainder to him-
self, his heirs and assigns for ever: which several estates
and limitations aforesaid are subject to a proviso “ that
“ it should be lawful for himself and *Francis Basset*,
“ during their respective lives, and the son and sons of
“ their respective bodies, and the heirs male of such
“ son and sons, and his own heirs male, as they
“ should be severally and successively in the possession of
“ the freehold, by virtue of the limitations aforesaid;
“ and for the said *TRUSTEES and the survivors and sur-*
“ *vivor* of them, and the heirs of such survivor, during

Power to
make leases
to be liberally
construed.

[1442]

1763.
RIGHT
V.
THOMAS.

“ *the minority* of any such son or sons or issue male; at
“ any time or times, by any deed or deeds to be signed
“ and sealed by him or them respectively, in the pre-
“ sence of two or more credible witnesses, to *demise*,
“ *lease*, or *grant* to any person or persons, either in pos-
“ session or reversion, for one life, or for two or *three*
“ *lives*, or for *any* number of years determinable on the
“ death of any one, two, or three person or persons to be
“ named in every such lease, all or any part of the said
“ premises *which had been* USUALLY so *demised and letten* ;
“ so as there should be no more than three lives in being
“ at any one time, of or on any one lease or demise so to
“ be made and granted; and so as upon every such
“ lease or demise so to be made, there should be reserved
“ so much or more yearly rent as then was or had been
“ given or received for the same premises, within twenty
“ years then last past; or a *proportionable rent*, where a
“ greater or lesser *part* of any farms or tenements, either
“ separately or apart, or together with any other part or
“ parcel of the said premises or other lands, should be
“ demised or be payable quarterly or otherwise; and to
“ continue during the estate and term thereby granted,
“ and to be incident and go along with the reversion and
“ remainder expectant on such leases respectively, with
“ usual covenants on the lessee's part; and so as no such
“ lease should be dishonourable of waste; and so as in
“ every such lease, there should be a condition of re-
“ entry for non-payment of rent, and for waste; and so
“ as every lessee should execute a counterpart of such
“ lease. And it was by the said indenture declared and
“ agreed, that all such leases, grants and setts as should
“ be made *by virtue thereof* should be *good, valid* and
“ *effectual* in the law, to all intents and purposes: and
“ that the respective lessees, their executors, &c. should
“ and might hold and enjoy the several, &c. to them re-
“ spectively demised, for the respective terms and estate
“ for which such lease should be made.”

The marriage was solemnized in 1737.

[1443] The said *John Pendarves Basset* died on 19th *Septem-*
ber 1730, without making any appointment of the pre-
mises; leaving his wife enseinte with a son, who was
born on 22d *May* 1740, and was baptized *John Prideaux*,
and became intitled to an estate tail in the premises, sub-
ject to the said rent-charge to his mother, and such other
incumbrances as then affected the premises.

By an order of the court of Chancery, *Christopher*
Hawkins, esq. was appointed receiver, and was empowered
to make contracts for leases for one, two, or three life or
lives, or years determinable thereon, of all such parts of
the said estates as have been usually so granted, and to

fill up and renew the lives in the said leases, and to receive the fines payable thereon.

In pursuance of which order, the said Mr. *Hawkins* contracted with *Nicholas Tresidder*, for a lease of four fields, &c. *parcel* of the premises in question, which by the death of *Henry Pendarves*, were then fallen into possession; for ninety-nine years, if *Mary* the wife of the said *Nicholas Tresidder*, his son, and *Ann* his daughter, or either of them, should so long live; in consideration of a fine of 175l. to be paid as hereinafter mentioned, and the yearly rent of 13s. and 4d. and 13s. and 4d. for a heriot.

Accordingly, by an indenture of lease, bearing date on the 24th June 1742, and made between the surviving trustees in the said settlement on the one part, and the said *Nicholas Tresidder* on the other part, reciting the said proviso and power of leasing in the said settlement contained, and the appointment of Mr. *Hawkins* as above-mentioned, and the said contract made by him with the said *Tresidder*, with the approbation of the master in *Chancery*, the said surviving trustees, *in pursuance of the said power*, and in consideration of 87l. 10s. then paid to Mr. *Hawkins* by *Tresidder*, and of 87l. 10s. more, to be paid in six months, and of the rents and covenants therein aftermentioned, and with the approbation of the said master, *demised, leased, and granted* to the said *Nicholas Tresidder*, his executors, administrators and assigns, all those four fields, &c. to hold for ninety-nine years, if *Mary* the wife of the said *N. T. Nicholas* his son, and *Ann* his daughter, or any of them should so long live; yielding and paying therefore *yearly* the rent of 13s. 4d. payable quarterly during the said term, and 13s. 4d. *in lieu of a heriot* or farlief, at or after the several respective deaths of the said *Mary, Nicholas, and Ann*; and also repairing, &c. And in the said indenture is contained a proviso, that if the 87l. 10s. should not be paid within the stipulated time; or if the yearly sum of 13s. 4d. or any other the said reservations and agreements should be behind and unpaid and unperformed in part or in all, one year after the same ought to be paid or performed; or if the said *N. T.* his executors, &c. shall do or suffer any waste on the said premises; then it should be lawful to all and every person or persons, who for the time being shall be intitled to the reversion of the said premises, to re-enter, and the same to have again as in his and their former right and estate. And the said *Nicholas Tresidder* executed a counterpart of the said lease: and the last mentioned 87l. 10s. was duly paid at the stipulated time. And *N. T.* and *Nicholas* his son are still living.

On 17th May 1756, the said *John Prideaux Basset* died an infant under seventeen, intestate, without issue,

1763.

RIGHT
V.
THOMAS.

[1444]

1763.
RIGHT
V.
THOMAS.

and unmarried: whereupon, the lessor of the plaintiff, who is remainder-man under the limitations in the settlement, and also heir at law to his nephew the said *John Prideaux Basset*, and heir general to the said *John Pendarves Basset*, claims the premises in question, by virtue of the said remainder to him limited as aforesaid.

Then the case states, that there were contained in the deed of settlement, several tenements other than the *Barton of Pendarves*, which were enjoyed by the said *John Pendarves Basset* and his ancestors, at and before the said 11th of *April* 1737, by leasing the same from time to time respectively for terms of ninety-nine years; each of such terms being determinable respectively on the expiration of three lives: and that there were several other tenements in the said deed of settlement likewise contained, which were on the said 11th day of *April*, and had been before that time, holden of the said *John Pendarves Basset* and his ancestors, to farm by leases at a rack-rent.

Then there are stated several old leases of the *Barton of Pendarves*, &c. as far back as Queen *Elizabeth's* time, and reciting others in *H. 8th's* time; some for terms of years, and some for ninety-nine years determinable on three lives, at different rents; and that on 15th *September* 1631, the fee-simple of the said *Barton of Pendarves* was conveyed to *William Pendarves*; and, by him, afterwards (in 1738) to *Samuel Pendarves*; and in 1738, on the death of *Thomas Pendarves*, came into the possession of the said *John Pendarves Basset*. And an indenture tripartite is stated, bearing date 15th *December* 1738, whereby the said *Samuel Pendarves*, in consideration of natural love and fatherly affection to his second son *Thomas Pendarves*, and for his better advancement, livelihood and maintenance, covenanted to stand seised(b) to the use of the said *Samuel*, for life; then of the said *Thomas Pendarves*, his executors, &c. for ninety-nine years, if the said *Thomas*, or any woman he should marry, or any issue of his body should so long live; paying yearly unto the heirs and assigns of the said *Samuel* the yearly rent of 4l. payable quarterly; with covenants on the part of *Thomas*, "to pay the rent, and repair the premises."

It was stated, (c) that the rent reserved on the said lease of the 24th of *June* 1742, to *Nicholas Tresidder*, is more

(b) i. e. of the whole *Barton of Pendarvois*, of which the premises in the lease of the 24th of *June* 1742, were part.

(c) *Co. Lit.* 44. b. 5 *Co. 5. b. a. Vide also* in 3 *Dano.* 245. several points on a power in a private act of parliament.

than a *proportionable* part of the rent reserved for the whole *Barton* in the deed of 15th *December* 1638.

The said *Francis Basset* demised the premises to the plaintiff; under which demise, the plaintiff entered, and was possessed: and, being so possessed, the defendants entered, and ejected him.

The question submitted to the opinion of the court, was, "whether the *lease* bearing date on the 24th of *June* 1742, and made to the said *Nicholas Tresidder*, be a "good and effectual lease, by virtue of the power herein before mentioned as part of the deed of settlement made 12th *April* 1737;" and thereupon, "whether the plaintiff ought to recover."

This case was argued by Mr. *Thurlox*, for the plaintiff; and Mr. Serjeant *Burland*, for the defendants.

Mr. *Thurlox* argued, that this lease was *not* of the kind intended by the power: nor was the *usual rent* reserved, nor the *usual covenants* contained on the lessee's part. That the intention of Mr. *John Pendarves Basset* was to continue the estate in his name and blood; and that the trustees had only a *naked power*, without any interest; and could not deviate from the *literal terms* of the power. And that the word "*usual*" can not be satisfied by a *single instance*, or even by *two instances*. (c)

Serjeant *Burland* said, that the *only* question at the trial was, "whether a *covenant to stand seised* could be [1 Wms. 158, 166, 171.] "considered as an evidence of the *usual manner of demising*." And he argued, "that it might;" and insisted, that a lease may be made by a *covenant to stand seised*, upon good consideration, as of marriage or blood. A *covenant "to stand seised,"* is a *conveyance of the land*, since the statute of 27 *H. 8.* These lands have been *usually* demised for years, determinable upon lives: and the power is, "to demise for *any number of years*, determinable upon the death of one, two or three persons named." And the present lease is *within the terms and intention* of the power.

THE COURT thought this as plain a case as possibly could be, on the part of the defendant. [1446]

Here is an estate settled, on a marriage, in *strict settlement*; and a power reserved to the guardians and trustees for infants, "to demise, lease and grant for one, two or three lives, or for any number of years deter-

(c) There are several leases mentioned to have been stated in this case, and some of the same kind with that in question of the *Barton* of *Pendarves*, of which the premises in question seemed to have been parcel.

1763.

RIGHT

v.

THOMAS.

[1 Vent. 228.

acc. 1 P. Wms.

166. 1 Ch.

Rep. 113, 114.

1 Burr. 124.]

"minable on three lives in being, any part, &c. usually so demised, and reserving the usual rent."

Now there is no doubt but these lands *had been usually* leased for lives; and the *usual profit* made by *finer*.

But it is objected, "that the last lease was made by *covenant to stand seised, &c.*"

A covenant "to stand seised," entered into by the owner, is a lease. (d)

(d) The lease to which the objection was made, was not made by the owner; for the question submitted to the opinion of the court, is expressly stated in page 1445, to have been, "whether the lease bearing date on the 24th June, 1742, and made to the said *Nicholas Tread-*der be a good and effectual lease by virtue of the power therein before mentioned." The objection to this lease was, that the deed of covenant to stand seised of the 15th December 1638, was the last deed on which any rent was reserved; and being by covenant to stand seised, was not a lease; and therefore, that the lands demised by the lease of the 24th June 1742, had not been usually so demised and letten as the lands over which the power was to be exercised, are by the terms of the power required to be. And it seems very clear that they were not; for by the express terms of the power, the lands which are the subject of it must be lands usually letten for one, two, or three lives or for years determinable on one, two, or three lives; and it appears by the state of the case here, though something confused, and more clearly from the state of it in 1 *Bluck. Rep.* 447. that from the 13th December 1638, down to the expiration of the lease, if it can be called a lease, as it is here adjudged to be, of that date, to the making the settlement in April 1737, in which the power was contained, the lands in question, with other lands, had been enjoyed, under the deed of covenants or lease of 15th December 1638; which, if it be allowed to be a lease, yet it certainly was not a lease for one, two, or three lives, or for years determinable on one, two, or three, lives, as the lands to be leased by virtue of the power ought to be; but it was a lease or term granted to the lessee or grantee for ninety-nine years, if he, or any wife he should marry, or any issue he might have, should so long live; and in fact the grantee or lessee had issue living to the expiration of the term: therefore these lands could not be the object of the power, not having been usually so letten as the lands described by the power, which by the words and intention was clearly confined to lands leased for one, two, or three lives, or for a term of years determinable on one, two, or three lives, which is the

1763.
JENNINGS

v.

MARTIN.
* 12 G. 1.
c. 29. s. 2.

This was alledged to be a settled fatal objection, and always allowed; the affidavit *not being positive* as the * act requires it to be.

Lord MANSFIELD said, that *if* this was a settled point, it must be adhered to: but he owned, he was *not* satisfied with the *reason* of it. For, if the party had sworn positively, "that the defendant *was indebted to him* in such a sum," his *adding* the words of reference would not excuse him from perjury, if the fact should be untrue.

But Mr. Justice DENISON observed, that vast numbers of such affidavits had been held insufficient; and the defendants had always been discharged on common bail, where the affidavits were only couched in terms of *reference*: for, that the act of parliament required *positive oath of the debt*; whereas *such* affidavits cannot be said to be *positive* oaths of it; being only expressed in words of *reference to somewhat else*, and not in terms of *absolute assertion*.

RULE made ABSOLUTE for discharging the DEFENDANT on common bail.

See before p. 655. *Pomp v. Ludvigson*, M. 1758. 32 G. 2. B. R. where this point was fully settled, agreeably to Mr. Justice Denison's opinion, though not to Mr. Justice Foster's. I have there collected all the cases on this head.*

* V. post 1992. *Barclay et al. v. Hunt*, M. 1766. 7 G. 3.

[1448]
Monday, 28th
Nov. 1763.

REX versus INHABITANTS of ST. PETER'S in DORCHESTER.

This case is already published, in my SETTLEMENT? CASES in quarto, No. 164. Page 413.

PULLEN versus WHITE.

The same, 28th
Nov. 1763.
Defendant to
be discharged
if no declara-
tion within
two terms.

THE question was, "whether the defendant was or was not intitled to be discharged upon *common bail*," on 4, 5 W. & M. c. 21. and the rules of court made subsequent to it; upon these facts, viz."

The defendant had been arrested by virtue of a writ taken out four days before the end of *Easter* term last, RETURNABLE on the last day of the *then next* (and now last) *Trinity* term. The arrest was within two days of the end of the same *Easter* term, wherein the writ issued. The defendant remained a prisoner in custody of the sheriff till after the end of *Trinity* term following, without being charged with any declaration. And then he applied to a judge, to be *discharged upon common bail*: but the judge, having some doubt, ordered it to be moved in court.

Accordingly, Mr. Solicitor General (*Norton*) did move

the court on behalf of the defendant, and prayed that he might be discharged on common bail; and had a rule to shew cause why he should not be so.

1768.
FULLER
V.
WHITE.

Mr. Walker now shewed cause against this rule.

The question depends upon these words of the second clause of 4, 5 W. & M. c. 21. ("That if any defendant be taken or charged in custody upon any writ out of the courts at Westminster, and detained in prison for want of sureties for his appearance thereto, the plaintiff may before the end of the NEXT term after such writ or process shall be returnable, declare against such prisoner, &c.") and upon the 6th clause of a rule of this court, made in Easter term, 5 W. & M. "That if the declaration be not filed before the end of the next term after the writ or process by which the prisoner was taken or charged in custody is returnable; and affidavit made and filed thereof before the end of twenty days next after such term, the prisoner shall be discharged on common bail, signed by a judge;" together with the under-mentioned rule of Tr. 2 G. 1.

[1449]

Mr. Solicitor General cited and relied on a case of Long v. Murrel, M. 14 G. 2. 1740. in this court, as a case directly in point for him, and determined unanimously by the court, after solemn discussion and deliberation.

(But that was a case where the defendant was not in custody of a SHERIFF (as this defendant is,) but of the MARSHAL, (to whom he was committed by virtue of a habeas corpus brought by him, to remove himself from C. B. where the plaintiff's action was originally brought;) and the court determined it upon a rule made in Trin. 2 G. 1. 1716. "That if a defendant be committed to the marshal, or charged in custody of the marshal; or charged or committed by virtue of the process of this court, to the custody of any SHERIFF or other officer whatsoever, at the suit of any plaintiff; and shall so remain in custody for two terms; and the plaintiff shall not declare against the defendant within that time; that then such defendant after the end of the second term after SUCH IMPRISONMENT, shall be discharged out of the prison where he shall be detained, on filing common bail signed by one of the justices of this court, without giving notice to the plaintiff or his attorney." In OTHER respects, the case cited was the same with the present: for, that writ was taken out in Easter term 1740, and was returnable on the last day of Trinity term following, (as this is;) and that defendant was taken in Easter term, (as the present defendant was,) and removed himself by habeas corpus before the writ upon which he was taken was returnable. The court, in that case, grounded

1763.
FULLEN
v.
WHITE.

their opinion upon the words of that rule of *Trin.* 2 G. 1. "And shall *remain in custody for two terms*:" and in virtue of those words they ordered the defendant to be discharged.)

THE COURT were of opinion, in the present case, likewise, that the defendant should be *discharged* on filing *common* bail; Lord *Mansfield* saying, that there was no difference (in *this* respect) between the man's being in the custody of the *sheriff*, and his being in the custody of the *marshal*.

[1450]

ORDERED that the defendant be discharged out of custody of the sheriff, on filing *common* bail.

The end of *Michaelmas* Term, 1763. 4 G. 3.

Memorandum—

There were *only* THREE judges of this court during this whole term.

HILARY TERM,

1451-1452

4 GEO. III. B. R. 1764.

Sir JOSEPH YATES, (being appointed a JUDGE of this Monday, 23d Court,) went out *Serjeant*, this day. Jan. 1764.

Sir JOSEPH YATES took his place as JUDGE of this Tuesday, 24th Court. Jan. 1764.

HARRIS, *Executor, versus* JONES.

Thursd. 26th Jan. 1764.

ON a question, "whether an *executor* should be permitted to *discontinue*, WITHOUT payment of *costs*." [S. C. 1 Black. 451. Buller 392.]
Mr. *Ashhurst*, for the plaintiff-executor urged that an *executor* should *not* pay costs in *any* instance excepting *one*: viz. where he had brought an action as executor, which he *might* have brought in his *own* name: for which, he cited Sir J. S. 682. *Portman v. Came*. [Executor on discontinuing to pay costs. See 2 H. Bl. 277.]

But THE COURT were clear, that the giving an *executor leave to discontinue*, was a matter of *discretion* in the court; and that they ought *not* to give him such leave, in any case where he had *knowingly* brought his action wrong, unless he would consent to *pay costs*.* [S. P. Post. 1498.]

Whereupon Mr. *Ashhurst* agreed to take his rule for leave to *discontinue upon* payment of *costs*.*

A RULE was granted ACCORDINGLY.

WEST *versus* RADFORD.

* V. post. p. 1584. Hawkes, executrix v. Saunders, 17th Nov. 1764. B. R.

THE declaration was filed on the last day of the second term after the return of the writ: but the *notice to plead* was only given a little before the *essoign-day* of the following term. [1452]

The defendant had objected that this was *irregular*; for that the *notice "to plead"* ought to have been given *before the end of the second term*, as well as the *declaration filed* before that time: and the defendant had obtained a rule to shew cause why the proceedings should not be set aside for *irregularity*, with costs.

But it was holden to be well enough: Mr. *Owen* certifying it to be the practice. And

THE COURT discharged this rule, with costs.

Notice to plead, when to be given. [See 2 Durn. 112. 3 Durn. 124.]

1764.

Tuesday, 31st
Jan. 1764.

Rex versus Inhabitants of SALFORD.

This case is already in print, in the quarto-edition of my SETTLEMENT CASES, No. 166. page 516; where it may be seen at large.

Wednes. 1st
Feb. 1764.

REX versus BANKES, Esq. et al'.

[S. C. 1 Black.
445. 452.]

In rule for a mandamus to elect a mayor, a subsisting mayor de facto must always be a party.

* V. 11 G. 1.
c. 2 § 3.

[1453]

UPON Monday, the last day of last *Michaelmas* term, Mr. Morton shewed cause against a rule, made upon *John Bankes*, esq. lord of the * LEET for the borough manor or lordship of CORFE CASTLE in the isle of Purbeck in the county of Dorset, and also upon *Robert Hann*, steward of the said leet, and also upon *Henry Bankes*, esq. the bailiff of the said leet and borough, and also upon *David Hibbs*, the deputy bailiff of the said leet and borough; and also upon *John Bishop*, *John Welsh*, *George Burgess*, *Christopher Summers*, *James Hayward*, *George Clarke Butler*, *William Havilland*, *George Best*, *John Briggs*, *Thomas Edmunds*, *Robert Cole*, *George Osmond*, *William Butler*, *Thomas Osmond*, *David Ralls*, *John Stockley*, *Thomas Crish*, *William Norman*, *Thomas Norman*, *William Ralls*, *John Roe*, *John Roe*, jun. *Henry Moss*, and *Robert Beere*, the jury summoned and ready to be returned to the said court of the said leet on the 25th day of October last; to shew cause why a writ or writs of MANDAMUS should not issue, directed to them, requiring them the said lord of the borough and his said steward to hold a court leet in and for the said borough, manor or lordship of Corfe-Castle; and requiring the said *Henry Bankes*, or in his absence the said *David Hibbs*, to return and deliver unto the said COURT-LEET the PANNEL or LIST of the jury by him the said *David Hibbs* summoned on the 24th day of October last; and requiring him the said *Robert Hann*, at the said court so to be holden, in the usual manner to swear the said JURY; and also requiring them the aforesaid JURORS so impanelled and ready to be returned as aforesaid to be sworn in due form at the said court, and then and there to PROCEED TO THE ELECTION of a MAYOR of the said borough of Corfe-Castle for this present year, and to do every act necessary to be done by them or any of them respectively for that purpose, according to the form of the statute in such case made and provided.

THE CAUSE then shewn by Mr. Morton was not upon the merits: (for which, see the cases of *Tintagel*, *Hil.* 8 G. 2. B. R. and *Rex v. Newsham*, et al', common-council-men of *Carmarthen*, P. 1755, 28 G. 2. B. R.) He only objected to the want of NOTICE to the mayor de

facto; who ought (he said) to have been made a party to this rule, being in possession of the office already; and ought, in common justice, therefore, to be heard in defence of his right, before the issuing of a *mandamus* to proceed to the election of another in his stead. (a)

1764.

REX
v.

BANKES
et al^r.

And he cited the case of *St. Michel, Rex v. Scawen*, * Or rather in *Michaelmas* term 1753. 27 G. 2. (See the rule-book *Rex v. Lord of Monday* next after fifteen days of *St. Martin*, 27 G. 2.) Arundel of Wardour, who was lord of the manor. Where this matter was settled upon long argument and solemn determination, as he said. (But I doubt of the solemnity of it; because, though I was in court upon that day, I took no note of it. Lord Chief Justice Lee was then absent.

THE COURT were of the same opinion, in the present case; and ordered that the rule should be amended by inserting the name of MR. PRICE the mayor *de facto*; and that he should be served with it.

Afterwards, (*viz.* on Saturday last, 28th January,) Mr. Morton, on behalf of the defendants, shewed cause against making the rule absolute.

He insisted (1st.) That this election of the mayor *de facto* was NOT APPARENTLY and CLEARLY such a one [1454] as was merely colourable only and void: (2dly.) That if it was, yet the prosecutors would not be entitled to this special *mandamus*, but only to a general one.

To prove the first point, "that only such an election [2 Durn. 260. " can be a sufficient foundation for the court's granting Doug. 84. 5. " a *mandamus*," he cited the above-mentioned case of 4 Burr. 2010.] *Tintagel, H. 8 G. 2. B. R.* where *Paskoe Hoskins* and *Robins*, were the contenders for the mayoralty; and *Robins* was the mayor *de facto*; and the other applied for the *mandamus*, which was in that case granted; but the court declared against granting such a *mandamus*, if they should conceive the least doubt in the world concerning the lawfulness of the pretended election, and unless it was the clearest case imaginable; and professed, that they would not grant the writ, previous to an information, but where it should appear to be a very clear case "that there had not been a due election." For if there was any doubt concerning the lawfulness of the election that was set up, the truth of it ought to be left to be tried in an information in the nature of a *quo warranto*.

Lord MANSFIELD proposed, that the counsel for [Sayer's Rep. 211. acc.] the defendants should file their affidavits; that the prose-

(a) Sayer's Rep. 211. S. C. and in *Black. Rep.* the objection is stated to have been that his name was not in the rule. See also *post.* 2009, 2010, Sayer's Rep. 140. and 2 Durn. 260.

1764.

REX
v.BANKES
et al'.

*V. post 2008. *former* should prove to be the case, the court *ought not* to grant a *mandamus*: in the *latter* case, they *ought*. But still, he said, this *SPECIAL mandamus*, which *confined* it to the *very individuals* who were summoned on the 24th of October, was *certainly wrong*: so that the rule can not be made absolute in its *present* form.

Whereupon Mr. *Morton* consented to file his affidavits:

[See 15 Vin.
234.]

* N. B. In a
case of Rex v.

Holmes, H. 9 G. 2 B. R. Lord Hardwicke mentioned the case of Tintagel as the only case where such a *mandamus* had been granted: and he said, the reason of it was because it was a quite clear case: and the corporation was without a mayor. Otherwise, he said, it would not have been granted.

cutor's counsel might be able to judge, whether, upon the affidavits on both sides compared together, it *was* a * doubtful election, and fit to be tried upon an information in nature of a *quo warranto*; or whether it was a * mere colourable election and *clearly void*. For, * if the

And Mr. Serjeant *Davy*, who was for the prosecutor, intimated that if he should find it to have been only a *doubtful* or *questionable* election, he would not pursue the rule any further.*

ADJOURNED,
for a few days.

[1435] Four days afterwards—Mr. Serjeant *Davy*, having read over the affidavits filed on the part of the defendants, was content to give up his rule, in case the defendants would not insist upon costs.

But Mr. *Bankes* not being willing to quit his claim to costs on the rule being discharged, that point was litigated.

THE COURT, having heard both sides, thought it reasonable, upon the circumstances disclosed to them, to discharge the rule *without* costs.

RULE DISCHARGED.

Friday, 3d
Feb 1764.

A month's
time to plead,
is a lunar
month.

TULLET *versus* LINFIELD.

UPON Master *Owen's* report concerning the regularity of a judgment, the question was, "whether a *month's* time to plead, (which had been given to the defendant by a judge's order,) should be understood a *calendar* month, or a *lunar* one."

The attorney for the plaintiff, understanding it in the latter sense had signed judgment after four *weeks* were expired, but *within the calendar* month: which the defendant complained of, as an irregularity: and it was, of course, referred to the master.

THE COURT were unanimously and clearly of

opinion, "that it was to be understood a *lunar* month, or "four weeks."

1764.

They said that in all *legal* proceedings, a *month* means *four weeks*.

TULLET
v.

LINFIELD.

On *quare impedit* indeed, six months are understood to be six *calendar* months. But that is (as Mr. Justice *Wilmot* observed) because it is manifest by the words of the statute of 13 E. 1. (W. 2.) c. 5. that by six months, *half a year* is there meant. The words are—"if he reco- vers his presentation within six months, damages shall "be given to *half a year's* value only."

And Mr. Justice DENISON said, there was a distinction between the *temporal* and *ecclesiastical* law, in interpreting this term "*month*:" the *former* understands it to be *lunar*; the *latter* to be *calendar*.

[1456]

Per Cur' unanimously,

RULE DISCHARGED.

RE, *versus* JUSTICES OF the PEACE for the CITY of
LONDON.

MR. Dunning, supported by Mr. Attorney General (Norton) moved for a *mandamus* to be directed to the justices, to *proceed* upon a matter depending before them, upon an application regularly made to them *before the repeal* of the 40th clause * of the act of 1 G. 3. c. 17. by the act of 2 G. 3. c. 2. which application had been *duly* and in *due time* made by *Jane Lawry* against *William Milner*, a debtor in their prison, upon the compulsory clause, in the former act, *then subsisting* in its full force; and upon such application, *all the requisites* had been *complied with* by all the parties concerned; and *Milner* had appeared, and given in a schedule of his effects on oath, and had *assigned* them over for the benefit of his creditors; but the court of quarter-sessions, in whom *jurisdiction* was thus properly *attached before* the repeal of the clause, voluntarily and without necessity or sufficient reason, and without the desire or consent of any of the parties, *ADJOURNED* the matter till a day which was *subsequent* to the time when the *repeal* of the said compulsory clause *took place*.

Justices cannot adjourn their proceedings to a day subsequent to the expiration of an act. * P. 315, of this act "for the relief of insolvent debtors."

They urged, that as the jurisdiction was *fully* *ATTACHED* in the justices, *whilst* the clause *subsisted*; and as the parties concerned had exactly *complied with all requisites*; and as the prisoner had sworn to his schedule, and *actually assigned* his effects for the benefit of his creditors, and thereby *divested* himself of his *all*, and rendered himself *subject to felony* if foresworn; it would be hard upon all the parties, if the *repeal* should be construed as meant or intended to *include this case*: but particularly

[See Vin. Abr. statutes (E.9) Mandamus, (K. 1.)]

1764.
 REX
 v.
 LONDON
 JUSTICES.

[1457]

hard upon and exceedingly injurious and cruel to the prisoner, if he should not, after all this, be intitled to his discharge out of prison. Therefore they insisted, that the repeal did not extend to this case, (a) according to the true intention of the legislature. And it would be contrary to law and justice, that the act of a court should work a *wrong to the party*. The jurisdiction was fully attached in the court of quarter-sessions, upon the appearance of all the parties, on the 26th of September, and their complying with all requisites. Then the said sessions adjourned it to the 19th of October, which was still within time; for the repeal takes place only from and after the 19th of November (1761 :) and all the parties then attended, and had done every thing incumbent upon them. But on this 19th of October 1761, the lord mayor declared, that he had promised one Webster, an attorney concerned against Milner, "that Milner should not be discharged that day." Whereupon the court of sessions remanded Milner: and then the repeal took place. But as this was the act of the court, they ought to proceed to do all subsequent acts, and complete the jurisdiction once attached in them.

But Lord MANSFIELD was very clear, and all the rest of the court concurred with him, "that no jurisdiction now remained in the sessions."

Great inconveniences were found to arise from this compulsory cause. The legislature had the whole affair under their consideration: and they have not thought fit to reserve any jurisdiction to the justices, after the 19th of November 1761. Their words are, "that from and after that day, so much of the former act as relates to creditors compelling prisoners charged in execution to

(a) If the sessions had proceeded, *qu.* whether the act done at an adjourned sessions, would not in this (as in other cases) have related to the first day of the sessions, and then the act was in force? It seems it would not, because the adjournment would appear on record.

By the stat. 7 & 8 W. 3. c. 3. several regulations were made in favour of persons indicted for high treason: that act was made to take effect after the 25th March 1696. Sir W. Perkins was tried on the 24th March 1693, which was but two days before the act took effect, and the court refused to adjourn till the act took effect, a behaviour directly contrary to that of the justices of the peace, in the present case; but though the defendant in that case was guilty, yet Jeffries behaved with great severity throughout the trial.

" deliver up their estates, and to such prisoners being *therapen discharged*, shall be and the same is hereby *repealed to all intents and purposes whatsoever.*"

And it is plain, that they doubted " whether those words would not have extended so far as to render the prisoner free from a prosecution for any perjury committed upon that clause; prior to the repeal:" for they add an express proviso, " that this act shall not extend or be construed to extend to pardon, indemnify, or discharge any person who hath incurred, or before the said 19th day of November 1761 shall incur, any penalty or forfeiture by committing any offence against the said act of the first year of his present majesty's reign; but that every such offender shall be liable to the forfeitures and penalties incurred, or before the said 19th of November 1761 to be incurred, under the said act, as if the said act had not been repealed, and had continued in full force."

Therefore, whatever may be the hardship of this particular case, we have no foundation to support our issuing such a *writ* as is prayed.

Nothing taken by the MOTION.

REX versus INHABITANTS of WINTERBURN.

[1458]
Monday, 6th
Feb. 1764.

This case is already printed and published in the quarto edition of my SETTLEMENT CASES, No. 167. page 520, 521. But there is a small error, in saying, " that Mr. Selwyn and Mr. Vernon had obtained the rule:" it should be, " Mr. Selwyn and Sir Fletcher Norton."

REX versus INHABITANTS of St. ANDREW'S HOLBOURN, Saturday, 11th
and St. GEORGE the MARTYR. Feb. 1764.

ON Friday 11th November 1763, Mr. Solicitor General (Norton) moved for a *certiorari*, to be directed to the justices of peace for the county of Middlesex, to remove into this court an order of sessions, made by them at their last *Hicks's-hall* sessions, quashing a scavenger's rate, and making a new one. And he prayed this *certiorari*, notwithstanding the clause in the act of 2 W. & M. st. 2. c. 8. § 12. Which says, " that persons aggrieved may have recourse to the general quarter-sessions of the peace to be holden for the place wherein the matter of grievance doth arise; and that their determination and order therein shall be FINAL, without any appeal to any other court whatsoever." And, to justify his application for it, he cited *Rex v. the Inhabitants of St. Leonard's, Shoreditch*, Tr. 11 G. 1. B. R. (reported in 1 Sir J. S. 630.) And also a case between St. John's

On an appeal from a poor rate, the session must quash the rate, not make a new rate

1764.
 REX
 V.
 ST.
 ANDREWS
 and ST.
 GEORGE'S.

parish and *St. James's Clerkenwell*; (without mentioning when it was determined, or where to be found.)

A rule was then made to shew cause:

And on the 21st of the same month, that rule was made absolute (without defence.)

The order, being accordingly now removed thither by *certiorari*, appeared to be an order made by the justices of peace for the county of *Middlesex*, at a general quarter-session of the peace holden by adjournment at *Hicks's hall* upon the 18th of *October* in the third year of King *George* the third, upon the appeal of several of the inhabitants and householders of the parishes of *St. Andrew, Holbourn*, above the bars, and *St. George the Martyr*, against a *SCAVENGER'S rate* made upon the inhabitants of the said parishes for the year 1763, according to a pound-rate at four pence in the pound, and confirmed by two justices of peace for the said county; which appeal set forth, "that the said rate or assessment of four pence in the pound was too high, and that a rate of three pence in the pound, together with the surplus in hand, would raise a sufficient sum; and that the imposing a higher rate was therefore prejudicial to the appellants, and illegal, and that they were thereby aggrieved:" on hearing which appeal, and counsel on both sides, and examining witnesses on oath, and duly considering all circumstances, the court of sessions *quash* the said rate of assessment, and *thereupon make, settle, impose and set a new rate or assessment* according to a pound rate at three pence in the pound for the said year, upon the inhabitants of the said parishes: and appoint, empower and require the scavengers to demand, gather and collect such *new rate or assessment* of and from all and every the said inhabitants of the said parishes, in the manner therein particularly expressed.

The exception taken to this order, by *Sir Fletcher Norton*, now attorney-general, and *Mr. Coxe*, was, "that the justices at the quarter-sessions have *exceeded their jurisdiction*, in taking upon themselves to *make a new rate*;" whereas they have no power to do any thing more than to *quash* that which was *appealed from*, if they should find that the appellants were really aggrieved by it.

Mr. Stowe, on the other side, endeavoured to support the order of sessions, by comparing it to the case of an appeal from a *poor's rate*; upon which the justices at sessions have it in their discretion (as he alledged,) *either to make a new rate* themselves at sessions, or to *remand* it to the churchwardens and overseers for *them* to make a new one: in proof of which assertion, he cited the case of the parish of *St. Leonard Shoreditch*, in 2 *Salk.* 483. in point.

[1459]

And observed and urged, that by the 12th section of 2 W. & M. st. 2. c. 8. the justices in their quarter-sessions are impowered to hear and *determine* all matters to them complained of; and their *determination and order therein* is made FINAL.

1764.

REX
V.
ST.

ANDREWS.
and ST.
GEORGE'S.
[19 Vin. 354]

However, if *this part* of their order which settles a *new* rate should be esteemed going a *step further* than their jurisdiction extends, yet their order is at least good so far as relates to the *QUASHING of the former rate*.

But Mr. Attorney-General and Mr. Coxe replied, that a *poor's* rate differed very much from a *scavenger's* rate: for, the *former* is by the 43 Eliz. c. 2. to be made by the churchwardens and overseers; the *latter*, by the before-mentioned act 2 W. & M. c. 8. § 10. is directed to be made and settled by the constables, churchwardens and overseers and surveyors of the highways, and *such other ancient INHABITANTS* as according to custom are usually present at the election of parish-officers, or the *greater number of them* present.

[1460]

They alledged also, that the case of *St. Leonard's Shore-ditch*, in *Salk*, 483. had been always *complained of*; and is referred to and expressly *contradicted* by the 17 G. 2. c. 38. § 6. [S C. Carth. 464. 12 Mod. 212. and Ld. Raym. 793. acc.]

Besides, the quarter sessions have power given them by 43 Eliz. c. 2. "to take such order, upon an appeal from a *poor's* rate, as to them shall be thought convenient: and the same is to conclude all the parties." (See sect. 6.)

But no such power is given to them by *this statute* of 2 W. & M. c. 8. Even the 12th section of it only impowers them "to hear and determine all matters to them complained of," concerning grievances by such scavengers rates, &c. And such their *determinations and orders* are to be "final and without appeal." But in the *present* case they have gone *beyond their boundary*; and have *themselves* made a *new rate*, which they had no *pretence of authority* to make; for, it is to be made by the parish-officers and the *body of the inhabitants*, who are charged with the payment of it: whereas this *new rate* of theirs, would, upon the supposition of its being a good one *finally and without appeal* bind all the inhabitants, without their being even *consulted* in it.

This order is therefore a *bad* one, and must be quashed *in toto*, and not for the latter part only. And there is no harm in this: for, if there be an *overplus*, it will go in aid of the next year's expence. But, on the other hand, if the old rate was to be vacated, after the scavengers have made their contracts for the whole year under it; that might be attended with great inconvenience.

The court being perfectly satisfied by what

1764.
 REX
 v.
 ST,
 ANDREWS
 and ST.
 GEORGE'S.

REX *versus* LYON.

[1461]
 Monday, 13th
 Feb. 1764.

Bail cannot
 get their re-
 cognizance
 discharged
 without pay-
 ment of costs.

* Vide ante,
 p. 10.

had been urged by Mr. Attorney General and Mr. Core, were clear in their opinion, " that the justices at their " quarter- sessions had no power to MAKE this NEW rate ;" and quashed their order *in toto*. (a)

ON Thursday last (the 9th instant,) Mr. Clayton, on behalf of the prosecutor, shewed cause why the recognizance of the bail should not be discharged.*

The case was this—LYON was indicted at *Hickes-Hall*, for *perjury*: and removed the indictment hither by *certiorari*; previous to the issuing whereof, he entered into recognizance with two sureties, as usual, " to appear " and plead in the next term, and to give notice of trial " and go to trial in or at the sittings after such next term, " unless the court shall otherwise direct;" which condition this man was so far from performing, that he neither gave notice of trial, nor went to trial either in or at the sittings after the *then next term*; and, in the *subsequent term*, though he did then indeed give notice of trial, yet, instead of going to trial, he *withdrew* his record: so that this recognizance was clearly and indisputably become FORFEITED; and was agreed by Mr. Stowe, of counsel for the bail, to be so. But *after* this, the prosecutor had moved for costs against the defendant *Lyon*, for *not going on to trial* after he had given notice that he would do so: which costs had been actually *taxed*, and then regularly and duly demanded of *Lyon*; and upon *non-payment* of them by him, the prosecutor had obtained and executed an *attachment* against him; and he was now in CUSTODY upon this attachment for his contempt in not paying them.

[8 Durn. 409.] But, with regard to the merits of the prosecution, the defendant had given notice of trial in the following term, and went to trial according to such notice; and was ACQUITTED.

Mr. Stowe, on behalf of the bail, insisted that the prosecutor could have *but one satisfaction* for these costs; though he might have either required them of the bail, or taken the *principal* in execution: but having made his election to proceed against the *person* of the *principal*, and gotten his BODY in execution, he was not afterwards still

(a) [No reason is given for this; and it is contrary to 1 Burr. 246. and 4 Burr. 2102. and former cases, for the court to suppose the first rate good; therefore only the latter part of the order ought to have been quashed, as appears from 19 Vin. 354.]

at liberty to proceed against the *bail*; who remained *no longer liable*, after such *election* made by the prosecutor, to proceed against the *person* of the *principal*; notwithstanding the recognizance being (as he confessed it was) actually forfeited.

1764.

REX

v.

LYON.

Mr. *Clayton* very strongly urged, that, as the recognizance was acknowledged to be *actually forfeited*, the *bail* ought not, in point of law or reason, to be *discharged* from it, *till* these costs, which were solely owing to their principal's own *wilful* default, should be *paid* to the prosecutor.

[1462]

THE COURT, as then advised, were inclined to think that the prosecutor, having made his election to proceed against the person of the principal, and having taken his body in execution, could *not*, after that, take further remedy against the *bail*.

However, they gave Mr. *Clayton* a day or two, to look into it.

ADJOURNED.

Mr. *Clayton*, now, again insisted, that the recognizance ought *not* to be discharged, *till* the prosecutor be *paid* the costs which he incurred by the defendant's not proceeding to trial according to his notice.

And he urged, in particular, that by the statute of 5, 6 W. & M. c. 11. § 3. "If the defendant prosecuting the writ of *certiorari* be convicted of the offence for which he was indicted, the court shall give reasonable costs to the prosecutor, &c. which costs shall be taxed according to the course of the court: and the prosecutor, for the recovery of such costs, shall within ten days after demand made of the defendant, and refusal of payment, on oath, have an attachment granted against the defendant, by the said court, for such his contempt; and the said recognizance shall NOT be DISCHARGED TILL the costs so taxed shall be PAID."

Therefore this recognizance ought not, he said, to be discharged till these costs should be paid.

Mr. *Stowe*, for the bail, alledged that this act of parliament, made "to prevent delays of proceedings at the

"quarter-sessions of the PEACE," relates *only* to quarter-sessions, not to indictments for perjury found at HICKS'S HALL; which is before the justices as justices of OYER AND TERMINER.*

Besides, this clause, now insisted upon by Mr. *Clayton*, begins thus—"If the defendant prosecuting such writ of *certiorari* be CONVICTED of the offence for which he was indicted, then the said court of King's Bench shall give reasonable costs to the prosecutor, if he be the party injured, or a justice, &c. or other civil officer point."

* And so it was determined in Sidney's case, Rex v. Sidney, P.

15 G. 2. 1742. B. R. [S.C. Str. 1165. determined on another point.]

1674.

REX
V.
LYON.

"prosecuting as an officer:" whereas this defendant was not convicted; but, on the contrary, was acquitted.

Moreover, the costs *at present in question* are not costs within the act of parliament, *even if* the defendant had been convicted: these are costs for not going on to trial; and the attachment and execution are all exclusive of this act of parliament, and not within the terms or meaning of the recognizance.

But THE COURT held, that as the recognizance was *actually forfeited*; and the prosecutor had had costs *taxed to him* for the defendant's neglecting to go on to trial; and as he had received *no satisfaction* for these costs, (for the man's body being in custody is *no real satisfaction* to him for the costs;) there was no reason for their *discharging* the recognizance: for there is no pretence for persons to apply for a *favour*, without first doing justice. (b)

Wherefore

Per CUR.—The RULE "to shew cause why
"the recognizance should not be discharged," was itself DISCHARGED.

Monday, 13th
Feb. 1764.

[S. C. 1 Black.
456.]

Executors being insolvent, administration should be granted to some solvent person.

REX versus Sir EDWARD SIMPSON.

ON Friday last (the 10th instant) Dr. COLLIER, in consequence of a rule of "leave" for a *civilian* to attend," shewed cause against a rule made upon the judge of the Prerogative Court of the Archbishop of Canterbury, to shew cause why a writ of MANDAMUS should not issue, directed to him, requiring him "to ADMIT of the RETRACTION of Edmund Browne, one of the executors named in the last will and testament of Sarah Elizabeth Angelica Latour widow deceased, of his RENUNCIATION of the said will; and to grant a probate thereof with the codicils annexed, to the said Edmund Browne and Anne Layton, being the surviving executors named in the said will."

The doctor stated the facts to have been as follows—

The testatrix by her will made *three executors*, two of whom were his clients, Anne Layton, and this Edmund Browne: which Edmund Browne was also a legatee in the will, and a witness to it; and so also was Mrs. Long, whom this Edmund Browne afterwards married. There were several caveats entered, and many litigations about the probate, and likewise about the validity of this will and the codicils to it; in the course of which litigations,

(a) Qu. For it does not appear that the prosecutor had given rules without which the recognizance was not forfeited. 2 Salk. 370, pl. 4. 2 Hawk. F. C. 203. Chap. 37, sec. 58.

this *Browne* was two or three times examined as a witness to prove it: and, in order to render him a good and unexceptionable witness to prove the will, he had no less than *three times* formerly RENOUNCED the *executorship*, as well as released his and his wife's legacies under the will.

1764.

REX
V.

SIMPSON.

There were several sentences in the Prerogative Court in favour of the will and codicils; and affirmations of them by the delegates upon appeal; and the cause remitted to the prerogative judge: and at length, after several caveats, sentences, and appeals, the delegates had decreed "that probate should be immediately granted to the" said *Anne Layton*, under seal:" and the judge of the Prerogative Court, being ready to give his opinion (after the last litigation of all,) was served with the present rule: against which, the doctor now came to shew cause. (So that, in fact, no probate under seal was yet ACTUALLY granted.)

The doctor insisted that the judge of the Prerogative Court was, after this decree of the delegates, merely ministerial, and had nothing to do but to carry the sentence of the delegates into execution.

He asserted, that by the ecclesiastical law and by the practice of the ecclesiastical courts, it is the constant and established rule "NEVER to allow a retractation of a renunciation made UPON OATH:" which the renunciation at present in question was. He has sworn "that he has not intermeddled NOR WILL intermeddle with the effects of the testatrix: but renounces all right of execution of the will: so help him God." This the doctor alledged to be the settled form of the oath: and this oath this man took; and is consequently bound to keep. It would be totally against good conscience, to dispense with this oath, in any case but where a man has been drawn into it by fraud and imposition.

He insisted that by both canon and civil law, it was irrevocable.

By the canon law, a renunciation *spontè facta* decessit the right. (To prove which point, he cited the Decretals and *Linwood*.)

By the civil law, any renunciation shall bind.

And he declared, that he had examined their books, and could not find any instance of a retractation of a renunciation upon oath.

Where an executor does not renounce, but reserves a power to come in and prove; there indeed he may come in at any time.

He mentioned likewise a common-law case, *Broker v. Charter*, in *C. B. Cro. Eliz. 92*: to prove "that qui semel repudiaverit, shall not be afterwards executor." There

[1465]

1764.
 REX
 v.
 SIMPSON.

the renunciation was only by *letter*; whereas in the present case, it was upon *oath*.

He acknowledged, that in a case of *Hayward and Day*, a *retraction* of a renunciation *was suffered*: but that, he said, was upon the foot of *fraud* and *imposition*; which he *allowed* to be a cause sufficient.

Mr. *Leigh*, on the same side, (*viz.* for Mrs. *Layton*, and against the *mandamus*) cited *Hensloe's* case, 9 Co. 37, 38, and *Hardress* 111. *Pawlet v. Freak*: which shews that by *our* law, if one of several executors proves the will, this makes them *all* executors, even though the rest refuse. Therefore (he said) a *joint-probate* would not at all alter the law: it will still be exactly the *same*, as upon this *single* probate. Why then should this court *oblige* the spiritual judge, who *ought not*, by *their* law, to grant it *after* renunciation, to *violate the rules of his court*, to *no* purpose?

Besides, it may be attended with *mischievous consequences*: for the grant of probate to this *Edmund Browne* will *invalidate* his and his wife's *testimony* given in evidence to prove the will; which may be overturned, perhaps, upon some future contest about it. And many other inconveniences may attend it.

Mr. Attorney General (*Norton*) *contra*, enforced the rule for a *mandamus*, by arguing to the following effect.

Here is no probate at all, *yet* granted to *any* body. Therefore the only question is “whether a *renouncing* “*executor* has a right to come in and demand probate, “at any time *BEFORE* probate is at all granted to any “one.”

This question is *not* to be governed by the *canon* or *civil*, but by the *common* law.

And by the *common* law, an executor who has *renounced*, has yet a *right to come in and demand* probate, whenever he pleases, *notwithstanding such his renunciation*.

9 Co. 36. *b. Hensloe's* case, is most explicitly so. [V. p. 37, 38, of that case.]

[1466] *Dyer*, 160 *b. pl.* 42. *Brooke* Ch. J. admits it. *Hardress*, 111. *Pawlet v. Freak* in point.

The same doctrine is laid down by the lord chancellor, in 3 *Peere Williams*, 249. *Robinson v. Pett*, in Chancery, before Lord *Talbot*, 1734. (P. 251 of that case.)

Agreeable to which, is the case at a court of delegates, reported in 1 *Salk*. 311. *House and Downs v. Lord Petre*; (by which case it appears that the common law courts and the spiritual *totally differ* on this point; the *civilians*, contrary to the opinion of the common lawyers, holding a renunciation to be *peremptory*.)

The *temporal* courts formerly had, and many of them still have *power of granting probate*. (See *Hensloe's* case 37 *b.* 38 *a. b.*)

The statute of 31 E. 3. c. 11. did indeed put this matter upon a different foot.

But even now, the *ecclesiastical* courts have only a *naked* power: AFTER they have done their duty, they have *no* further power left in them. (See *Hensloe's case*, 38 a.)

An executor appointed by a will is to all intents and purposes an executor, as soon as *any one* of the executors therein named, shall have proved the will.

It is a *temporal right*: and the jurisdiction of the *spiritual* court, *beyond* what is founded upon the *statute*, is mere *usurpation*.

The executor is *vested* with all the property of his testator, *before* probate: and he can *do* every thing *before* probate, *but* bring an action.

The *spiritual* court therefore have no business to interfere, to *prevent* his obtaining probate, which he has a *right* to have.

The oath upon renunciation is *extrajudicial*, and was imposed *without any right or authority*: and the doctor admits that their courts may *absolve* the party from it, for * good cause; (though, I own, I have no notion * *Vide ante*, of such a power of absolution, if the oath was *really* 1464. *binding*.)

The *testatrix* has constituted *both* these persons her [1467] executors; and the *spiritual* court has *no right* to separate them: and in fact, Mrs. *Layton* is *poor*, has *pawned* the effects, and has even been in *prison*; and we come, *before* any grant of probate to her, and demand only to be *joined* with her in it.

If the matter was *doubtful*, yet the *mandamus* ought to *issue*, and the judge of the *spiritual* court be put to make a *return* to it: and then it will come solemnly before the court, *upon record*.

To all which, Mr. Attorney added a very material observation, " that both these persons were executors *in* " *TRUST only*, and had *no personal interest* in the effects " of the *testatrix*."

N. B. The charge of insolvency was retorted upon *Browne*.

Lord MANSFIELD—As *neither* of these two persons have *any interest of their own*, in the effects; and *each* charges the *other* with *insolvency*; and here is *no counsel* at all on behalf of the *cestuy qui trusts*: it would be much the best method, and most agreeable to reason and prudence, that *administration* should be, *by consent* of all parties, granted to some *third solvent* person.

Therefore let the *cestuy-qui-trusts* have *notice* of this proposal: and let *them*, as well as Mrs. *Layton* and Mr. *Browne*, give their answer to it.

For which purpose, it was then ADJOURNED.

1764.

REX
V.

SIMPSON.

1763. This motion now coming on again, it appeared, that
 REX the *cestuy-qui-trusts* supported *Browne*; and that though
 V. he had no interest of his own, yet he acted on behalf
 SIMPSON. of those who were concerned in interest.
 Whereupon the parties came into a

RULE BY CONSENT;

The substance of which was, " that *probate*
 " should be granted to *both*; but that *Mrs. Lay-*
 " *ton* should *not* receive any more money nor med-
 " dle any more: and *Browne* was to *indemnify* her;
 " and to pay her her *own legacies*, and all such costs
 " as she had been fairly out of pocket."

The end of Hilary Term 1764, 4 G. 3.

EASTER TERM,

1468

4 GEO. III. B. R. 1764.

THE KING *versus* PHILIP CARTERET WEBB, Esq.

The same against the same.

Thurs. 10th
May, 1764,
[S. C. 1 Black.
460.]

THE defendant having been *indicted* for perjury, at *Hicks's-Hall*, in *January* last, and that indictment removed into this court by *certiorari*, he pleaded "not guilty" to it; and the cause was at issue, and a special jury nominated: *after* which, the prosecutor *countermanded* his notice of trial; but the defendant chose to bring it on by *proviso*, and it stood for trial at the first sittings in this term. In the *interim*, *viz.* at the sessions next preceding this present term, the prosecutor got a *new* indictment found at *Hicks's-Hall*: and yesterday (the first day of this term) the prosecutor's counsel moved for leave to *quash their own indictment*, being (as they said) *insufficient and defective*; and having, as they conceived, *supplied* those insufficiencies and defects in their *new* indictment; upon which, they declared, that they intended to proceed as fast as they could; but should *not* proceed upon the *old* one, as it would be quite fruitless to do so when they knew it to be defective.

Terms imposed on a prosecutor on quashing an indictment.

And they cited Sir *William Withipole's* case in *Cro. Car.* 134, 147. and the case of the *King* against *John Swan* and *Elizabeth Jefferys* in Mr. Justice *Foster's* book of *Crown Law*, p. 104.

This motion was opposed by the counsel for the defendant; who endeavoured to represent it as a mere artful scheme to keep up a frivolous prosecution hanging over an innocent man's head, without any real foundation, and with intention to slur his character and credit.

The motion was adjourned to this day: and being now [1469] taken up again, and the point discussed, it ended in a rule by consent, that the new indictment should in all respects stand in the place of the old, and all things whatsoever remain *in statu quo*, exactly as if it had been the case of an amendment. The rule was drawn up in these words—"By consent of the defendant in these causes, now present in court; and of Mr. Serjeant *Glyn*, Mr. Recorder of *London*, Mr. *Stow* and Mr. *Dunning*, counsel for the prosecutors of the two indictments; it is ordered that the first indictment be

1764.
 REX
 v.
 WEBB.

“ quashed ; and that the second indictment shall be substituted and put in the place of the first ; and stand in the same condition, to all intents and purposes whatsoever. And the said counsel for the prosecutors, being called upon to *name* the prosecutor or prosecutors of the said indictments, declared, that they were authorized by Mr. *James Philips* the attorney concerned in carrying on these prosecutions, to say, that *John Wilkes* late of *Great George Street, Westminster, Esq* ; is the prosecutor of the said two indictments.”
 “ By consent of Mr. Serjeant *Glynn*, for the prosecutor. By consent of Mr. Attorney General, for defendant.”

“ By the court.”

But THE COURT declared their opinion, that a motion on behalf of a prosecutor ; “ for *leave to quash his own indictment*,” was *by no means* a motion of course ; more especially, after having put the defendant to *expence*, or having been guilty of unnecessary or affected *delay* ; and Mr. Justice *Wilnot* cited the case of the *King v. Moore* in 2 Sir J. S. 946, where an indictment for perjury having been removed by *certiorari*, and the defendant having paid costs for not going on to trial, the prosecutor afterwards moved to quash it ; which the court *refused* unless he would submit to *pay costs*.

Saturday, 12th
 May, 1764.

MARDER et UX. versus LEE.

Judgment entered up by husband and wife, upon a warrant of attorney given wife whilst a feme sole irregular with-
 [1470]
 out leave, and set aside without costs.

UPON the last day of *Hilary* term last, Mr. *Thurlow*, on behalf of the plaintiffs, shewed cause against a rule which had been obtained upon the motion of Sir *Fletcher Norton*, “ for the plaintiffs to shew cause why the judgment and writ of *fieri facias* executed there-
 “ on should not be *set aside*, with costs ; and the sum of 172l. 2s. 6d. levied by the sheriff of *Devon*, be paid to the assignees of the defendant under a commission of
 “ *bankruptcy* issued against him on the 12th day of *May* last.”

The case appeared to be, that LEE the defendant had entered into this *warrant of attorney* “ to confess a judgment to the woman-plaintiff, *dum sola* ;” and she afterwards married MARDER the man-plaintiff : after which marriage, the judgment was entered up by the HUSBAND and wife.

The particular dates of these several transactions were as follow—The *warrant of attorney* “ to confess the judgment ” bore date in *December* 1762. The plaintiffs intermarried in *February* 1763. The judgment was entered up in *May* 1763. Soon after, the execution was

taken out, and executed : and the money levied remains in the hands of the sheriff.

The QUESTION was, " whether this judgment thus entered up by the HUSBAND and wife, be regular, or not."

Sir Fletcher Norton's objection to it was, that the warrant of attorney did not justify this entry in the name of the HUSBAND and wife. For the warrant is a *naked power* not coupled with an interest : which power is determined by the woman's marriage.

But at least, the plaintiffs ought to have applied to the court, and done this *under their sanction*.

If a warrant be given " to enter up judgment at the *suit of two persons* ;" and one dies ; the *survivor* of them can not enter it up.

Mr. *Thurlow*, on the contrary, insisted that the judgment was regular.

The warrant " to confess a judgment" is *not* a *naked power* ; but a power *coupled with an interest* : and the marriage of the woman to whom it was to be confessed, can be *no revocation* of it ; whatever might have been the case, if *she had* * given such a warrant " to confess judgment to another person," and then married. (* See 1 *Show* 91. and 1 *Salk*. 117. which differ on this head. The former says, " that in such case you may file a bill, and enter judgment against both : " the latter, " that it would be a revocation of her warrant.")

1 *Salk*. 117. p. 9. H. 1 Ann. B. R. is in point. " A warrant of attorney was given to confess judgment to a feme sole ; who afterwards married. The court gave leave, notwithstanding the marriage, to enter judgment ; for that the authority shall not be deemed to be revoked or countermanded ; because it is for the husband's advantage : like a grant of a reversion to a feme sole, who marries before attornment ; yet the tenant may attorn afterwards."

Mr. Justice DENISON thought the marriage to be *no revocation* of this authority. He only doubted whether the judgment could be thus entered up, without leave of the court.

Mr. Justice WILMOT thought, that the case of the survivor (mentioned by Sir Fletcher Norton) almost governed the present case. And he observed, that the better way, in the case now before the court, would have been, to have entered up the judgment, *as before the marriage*.

Lord MANSFIELD thought it would be hard, that this judgment should be set aside ; if the plain-

1764.

MARDER
et ux'
v.
LEE.

[The court of
B. R. gave
leave to enter
up judgment
to the sur-
vivor in
2 Barnes, 43.]

[1471]

1764. tiffs might, upon a previous application, *have had leave* to enter it up in this manner.

MARDER
et ux'
v.

THE RULE was then enlarged, that
THE COURT might advise.*

LEE.

* V. 12 Mod. 989. *Reignolds v. Davis*, S. P. left undetermined. Note, That case is wrong stated in the Table of that book. It states, "that the *feme sole* gave the letter of attorney;" whereas it was given to her.

[See 4 East.
522.]

THE COURT now declared their opinion to be "that the judgment was *irregular*, for want of a previous *leave of the court* to enter it up." They held, that in order to warrant this entry of the judgment, there ought to have been an *application to the court* for leave to enter it up thus, *founded* upon a proper *affidavit* proving the marriage between the plaintiffs: upon which, a rule of court should have been obtained, giving leave to enter up judgment accordingly. But as this previous step was *not* taken, the judgment was *irregular*, for *want of it*: the consequence of which was, that the rule must be made *absolute*. But they did *not* think it reasonable to make the plaintiffs pay *costs*.

Therefore

Per Cur'.—Let the RULE be *ABSOLUTE*,
but *without costs*.

[1472]
Monday, 14th
May, 1764.

Hawker's li-
cences.

REX *versus* ROBOTHAM.

THIS was a *conviction* upon the HAWKERS AND PEDLARS act, 9, 10 W. 3. c. 27. § 1 and 3. removed into this court by *certiorari*.

Upon its coming on in the crown-paper, the conviction was quashed, for a manifest mistake of the justice of peace who convicted the defendant. For, though the defendant had a regular licence for travelling &c. *with a horse* (commonly termed by those people a *HORSE-licence*;) yet the justice had convicted him, because he travelled with *two* horses, and had not a licence to produce for *EACH horse* with which he so travelled: (which the statute as it appears by the printed statutes, doth * not require).

* See sect. 1.
and sect. 4.

On *Saturday 11th February*, last, Mr. Serjeant *Hewitt* took the exception: and

* N. B. The error is not in Dr. Burn, but in the act of parliament itself. See Dr. Burn's History

Mr. Serjeant *Nares* owned it to be fatal; but proposed to refer it to me, to award full satisfaction to the defendant, both for his costs and damages: for the justice, he said, had been *drawn into* this, by an * error in Mr. *Burn's Justice*, (p. 348. in the third edition in folio;) title "Hawkers and Pedlars;" where the word "*horse*" is (by mistake) put for "*year*."

Lord MANSFIELD supposed it to be only a slip of the *press*, rather than a mistake of the author; and Laws, with observations; P. 275. Title "Hawkers and Pedlars."

1764. tiffs might, upon a previous application, *have had leave* to enter it up in this manner.

MARDER
et ux'
v.

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[See 4 East.
532.]

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and sect. 4.

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Mr. Serjeant *Nares* owned it to be fatal; but proposed to refer it to me, to award full satisfaction to the defendant, both for his costs and damages: for the justice, he said, had been *drawn into* this, by an * error in Mr. *Burn's Justice*, (p. 348. in the third edition in folio;) title "Hawkers and Pedlars;" where the word "*horse*" is (by mistake) put for "*year*."

* N. B. The error is not in Dr. Burn, but in the act of parliament itself. See Dr. Burn's History of the Poor

Lord MANSFIELD supposed it to be only a slip of the press, rather than a mistake of the author; and Laws, with observations; P. 275. Title "Hawkers and Pedlars."

1764. tiffs might, upon a previous application, *have had leave* to enter it up in this manner.

MARDER

et ux'

v.

LEE.

* V. 12 Mod. 383. *Reignolds v. Davis*, S. P. left undetermined. Note, That case is wrong stated in the Table of that book. It states, "that the *feme sole* gave the letter of attorney;" whereas it was given *to her*.

[See 4 East.
532.]

THE RULE was then enlarged, that
THE COURT might advise.*

THE COURT now declared their opinion to be
"that the judgment was *irregular*, for want of a previ-
ous *leave of the court* to enter it up." They held, that
in order to warrant this entry of the judgment, there
ought to have been an *application to the court* for leave
to enter it up thus, *founded* upon a proper *affidavit*
proving the marriage between the plaintiffs: upon
which, a rule of court should have been obtained, giving
leave to enter up judgment accordingly. But as this
previous step was *not* taken, the judgment was *irregu-
lar*, for *want of it*: the consequence of which was, that
the rule must be made absolute. But they did *not* think
it reasonable to make the plaintiffs pay *costs*.

Therefore

Per Cur'.—Let the RULE be ABSOLUTE,
but *without costs*.

[1472]

Monday, 14th
May, 1764.

Hawker's li-
cences.

REX *versus* ROBOTHAM.

THIS was a *conviction* upon the HAWKERS AND PED-
LARS act, 9, 10 W. 3. c. 27. § 1 and 3. removed into
this court by *certiorari*.

Upon its coming on in the crown-paper, the conviction
was quashed, for a manifest mistake of the justice of peace
who convicted the defendant. For, though the defen-
dant had a regular licence for travelling &c. *with a horse*
(commonly termed by those people a *HORSE-licence*;) yet the justice had convicted him, because he travelled
with *two* horses, and had not a licence to produce for
EACH *horse* with which he so travelled: (which the statute
as it appears by the printed statutes, doth * not require).

* See sect. 1.
and sect. 4.

On *Saturday 11th February*, last, Mr. Serjeant *Hewitt*
took the exception: and

Mr. Serjeant *Nares* owned it to be fatal; but propos-
ed to refer it to me, to award full satisfaction to the de-
fendant, both for his costs and damages: for the justice,
he said, had been *drawn into* this, by an * error in Mr.
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"Hawkers and Pedlars;" where the word "*horse*" is (by
mistake) put for "*year*."

* N. B. The
error is not in
Dr. Burn, but
in the act of
parliament it-
self. See Dr.
Burn's History
of the Poor

Lord MANSFIELD supposed it to be only a slip
of the *press*, rather than a mistake of the author; and
Laws, with observations; P. 275. Title "*Hawkers and Pedlars*."

desired that Mr. *Burn* might have notice of it, in order to set it right in his next edition.

The conviction was quashed : and a rule of reference to me made as above proposed.

Memorandum—Upon my having taken the liberty, this morning, privately, to acquaint the judges, that I had the curiosity to search the *parliament-roll*, (on finding the words of the act to be nonsense, in saying “ for each year he or she shall so travel with ; ”) and that I had discovered a *blunder* in this original act of 9, 10 *W. 3. c. 27.* in omitting several essential words which ought to have been inserted therein, and which were inserted in the annual act of the preceding year, (namely, “ for each horse, ass or mule or other beast bearing or drawing bur- then he or she shall so travel with ; ”) which mistake manifestly arose from changing the annual duty before given, into a triennial duty, (as may be most clearly seen by comparing the annual act of 8, 9 *W. 3. c. 25. § 1.* with the triennial one of 9, 10 *W. 3. c. 27. § 1.*) and that Dr. *Burn*’s book was certainly agreeable to the true intent and meaning of the latter act, whatever it might be to its words : and that the mistake was in the statute itself of 9, 10 *W. 3.* which gives the duty for three years ;—

Lord MANSFIELD, Mr. Justice WILMOT, and Mr. Justice YATES (Mr. Justice DENISON not being present) were extremely clear “ that the act of parliament was so INTENDED ; ” and they thought it ought to be so CONSTRUED. And Lord Mansfield desired me to speak to the two Serjeants, to come together to the court of King’s Bench this morning, in order to have the rule set right.

They accordingly came up ; and his lordship explained the whole matter to them.

But Mr. Serjeant Nares saying that he had two reasons for giving it up ; one, that there was another fatal objection, viz. “ that the informer himself was the only witness ; ” and the other, that he had sent to the hawkers and pedlars office, and was there informed “ that it was their practice and usage ever since this act of 9, 10 *W. 3.* to require only one horse-licence to be taken out for travelling with several beasts of burthen ; ” and Mr. Wallace also (as *amicus curiæ*) informing the court that the late Lord Hardwicke had (when at the bar) given his opinion “ that though the intention of the legislature could not well be doubted, and there certainly was a mistake in the act of parliament ; yet, as it is worded, the commissioners could not OBLIGE a hawker or pedlar to take out more than one horse-licence for travelling with several beasts of burthen ; ” and that, ac-

1764.

REX
V.

ROBOTHAM.

[1473]

1764. cordingly, the commissioners *never* required more than one single horse-licence for *several* horses;—

REX

v.

ROBOTHAM.

THE COURT declared, that they only desired it might be understood, that *nothing had been determined* by them *upon the construction* of this act; and that they *should not* determine any thing upon it, *without hearing the point argued*; since the *USAGE* appeared to have been to require only a single licence for a number of horses.

[1474]

And Lord MANSFIELD wished that the commissioners of hawkers and pedlars might have notice of what had now passed.

UPON the whole, no alteration was made in the rule of last term: but it stands as it did: *viz.*

“ By consent of counsel on both sides, it is further ordered, that it shall be referred to *James Burrow*, esq. coroner and attorney of this court, to fix and assess what costs and damages the defendant has been put to and has *really* sustained; and that the sum so to be allowed by the said master, for costs and damages, shall be paid by *Francis Turner Blithe*, esq. the justice of the peace before whom the said defendant was convicted. And it is lastly ordered, that *no action* shall be brought touching this matter.”

[N. B. *Holdfast* on the demise of *Barker v. Chapman*, 5 MS. 149. was adjudged this term in *B. R.* May 18th, 1764, omitted by *Blackstone* as well as *Burrow*.]

SOULSBY *versus* HODGSON.

Tuesday, 29d

May, 1754.

[S. C. 1 Black.
469.]

Arbitrators
and umpire
may join in
making an
award.

[4 Burr.
2136.]

THIS was an action of debt upon an arbitration-bond. The arbitrators were to choose an umpire in case they themselves should not agree within a limited time. They did not agree within the limited time; but chose an umpire. The umpire accordingly made an umpirage: and they *joined* in it.

The only question was, “ whether the umpirage was duly made according to the powers given to the umpire:” or “ whether it was *ruined* and *rendered void* by the arbitrators *joining* in it.”

Mr. *Wedderburne* argued it, for the plaintiff: Mr. *Wallace*, for the defendant. And Mr. *Wallace* cited an anonymous case, out of 1 *Bulstr.* 184. Where *Williams* Justice says, “ that such an umpirage would be bad.” Notwithstanding which,

THE COURT were unanimous and clear, that this was the umpirage of the *umpire only*. He was at liberty to take what advice, or opinion, or assessors he pleased.

The * case which was cited at the bar is certainly a *mistake*, an error of the reporter. No such thing could be said, as is there reported : at least, there could be no determination founded upon it. It is a distinction in *words*, without any real difference in *sense* and meaning.

Per Cur.'

JUDGMENT for the PLAINTIFF.

REX *versus* SMITH.

A CONVICTION of the defendant for trading as a hawker, pedlar and petty chapman, *without having a licence*, having been removed by *certiorari* into this court, and now standing in the crown-paper,—

Mr. *Harrison*, on behalf of the defendant, took this objection to it (amongst others,) *viz.* 'That the evidence which the justice had stated in his conviction, was not sufficient to support his adjudication "that the defendant "HAD no licence." The charge was "that the man had "traded as a hawker, pedlar, or petty chapman, in selling "a piece of muslin, &c. *without* HAVING a licence : " the evidence stated by the justice, in the conviction, is only, "that the man *refused* to PRODUCE any licence." Whereas the trading WITHOUT HAVING any licence, and the *refusing* to PRODUCE his licence (in case he really has one,) are quite DISTINCT offences; and are so considered by the act of 9, 10 W. 3. c. 27. which gives quite distinct and different penalties for them, *viz.* 12l. for the former, and 5l. for the latter. *Refusing to produce* a licence which a man *has*, is, in its own nature, a very different thing from *not having one* to produce. And the man's having CONFESSED "that he *traded* as a hawker, pedlar and petty "chapman," is no ground for convicting him "for trading "as such *without* a licence;" notwithstanding his refusal to *produce* it. And though the 8th section of this act (as well as the act of 3, 4 Ann. c. 4. § 5.) gives the same forfeiture for *not producing* as for *not having one*; yet that cannot alter the nature of the offence.

Mr. *Griffith Price* argued on the other side, in support of the conviction. It was founded, he said, on 9, 10 W. 3. c. 27. § 8. which authorizes and strictly requires the justices of peace, either upon confession of the party offending, or due proof of witnesses upon oath, "that "the person so brought before him *had so* traded as *fore-* "said," and that *no such* licence shall be PRODUCED by such offender before the said justice; by warrant under his hand and seal, to cause the said sum of 12l. to be forthwith levied by distress and sale of the offender's goods, &c.

1764.

REX

v.

ROBOTHAM.
* V. 1 Bulstr.
184. where the
umpire joined
with the arbi-
trators, in the
original
award.

Wednes. 29d
May, 1764.

Conviction on
the hawkers
act.

1764.
 REX
 V.
 SMITH.

The *only* two facts requisite to ground a conviction upon, under this clause, he said, were, 1st. the *trading* in the manner described by the act of parliament; and 2^{dly}. the *refusing* or declining to *produce a licence*. And both these facts are here charged. It is alledged in this conviction, "that he was apprehended for *trading* as a hawker, pedlar, and petty chapman *without* a licence; and was charged upon oath, before the justice, with having *sold* a piece of muslin, &c. as a hawker, pedlar and petty chapman: which fact he confessed. That the justice demanded his authority for having done so: and required him to produce his licence: which he *did not produce*. Whereupon, the justice convicted him in the penalty of 12l. for having traded as aforesaid *without* a licence."

This is all exactly agreeable to *this* clause, (sect. 8th.)

There is indeed a penalty of 5l. given by the *third* clause, for such a trader's refusing to produce his licence to any justice of the peace, mayor, constable, or other officer of the peace of any *town corporate or borough where he shall so trade*, demanding it *ex officio*: which penalty of 5l. is given to the *poor of the parish where the demand shall be made*: whereas the 12l. penalty given by that same third clause is half to the informer, and half to the poor of the parish where the offender shall be *discovered*. But *this* is a conviction upon a charge proved by oath, under a power given to justices of the *county or place* (in general) where the *offence shall be committed*, pursuant to *another* clause of this act, (sect. 8.) in the 12l. penalty for not having or (which is just the same thing) *not producing* any licence.

Mr. *Harrison*, in reply, denied, that the conviction does pursue the act of parliament: for, he insisted, that *not having* any licence, and *not producing* one, are quite different things; and that the conviction ought to have been "*for not producing* one."

But Lord MANSFIELD said he could see no doubt of this conviction's being a good one upon the 8th clause.

* Mr. Justice Denison was not in court.

* Mr. Justice WILMOT declared himself to be clearly of the same opinion.

Upon the whole—Notwithstanding this (and some other objections that were taken and over-ruled,)

THE COURT affirmed the conviction.

N. B.

[1477]

Upon comparing the 8th section with the 3d, it is clear, that the 8th section means the 12l. penalty to be for the *same offence*, and to be the very *same penalty* with the 12l. given by the 3d section: and it seems to

consider *not producing* to be the same offence and the same thing as *not having*. 1764.

HODSON *versus* RICHARDSON.

Monday, 28th
May, 1764.

SEVERAL insurance-causes standing upon the same circumstances, it was agreed "that *all* should be "bound by the *verdict* given in *one*:" and a verdict was given in that one, for the *plaintiff*. But the defendant gave notice of a motion for a new trial; which he afterwards obtained.

[S. C. 1 Black.
463.]

Consent to be
bound by a
verdict means
a legal one.

Sir *Fletcher Norton* moved, on behalf of the plaintiff in the *other* causes, that the respective defendants should pay their money to the plaintiff *pursuant to their agreement*; he having obtained a *verdict* in the cause already tried.

Mr. Justice
Denison ab-
sent.

But THE COURT were clearly and unanimously of opinion, that a consent "to be bound by a *verdict* in "one of many causes upon the same question," means SUCH a verdict as the court thinks *ought to stand* as a *final* determination of the matter.

That in the present case, a *material* circumstance was *concealed* from the insurer, by the insured; and therefore the whole contract was *void*: and there ought to be a new trial; and the court had made a rule for that purpose.

NOTHING taken by the MOTION.

REX *versus* The INHABITANTS OF OPENSHAW.

Monday, 28th
May, 1764.

This case is already published, in my SETTLEMENT-CASES in quarto, No. 168. p. 522.

TRIQUET and others, *versus* BATH.

[1478]

PEACH and another, *versus* BATH.

Saturday, 2d
May, 1764.

MR. *Blackstone*, Mr. *Thurlow*, and Mr. *Dunning*, on behalf of the plaintiffs, shewed cause why the bill of *Middlesex* in each of these causes should not be set aside, and the bail-bond be cancelled.

[S. C. 1 Black.
471.]

English secre-
tary to a
foreign mini-
ster protected
from arrest.

The rule was made upon affidavits "of the defend-
ant's being a *domestic servant* of a *foreign minister*;
"and having taken all the proper steps to intitle him to
"the privilege of such domestics."

The only question was, "whether the defendant [9 Darn. 80.]
"(*Christopher Bath*) was *really and truly* and *bonâ fide*
"a domestic servant of Count *Hauslang*, the *Bavarian*
"minister" or, "whether his service was only *colourable*,
"and a *mere sham and pretence* calculated to protect him
"from the just demands of his creditors."

Tidd's
ed 191-
J. Hau
4829

1764.
TRIQUET
et al.
v.
BATH.

On the part of the defendant, it was sworn, "that he was regularly appointed by Count *Huslang*, to be one of his " ENGLISH SECRETARIES, at 30*l.* per ann. for board and " lodging, &c." And he swore to *actual attendance* and *actual service*, at several times, at the count's house; and writing, copying and carrying several letters and memorials: in short, the defendant's affidavits were so framed, that every thing was sworn that *in absolute strictness* could be required, to bring him within the description of a *domestic servant* to this minister.

On the part of the plaintiffs, it appeared, that *Bath* was a *mercier in Dublin*, about seven or eight years ago; that he had afterwards been a *commissary of stores* abroad, and was now upon *half-pay* as such, at 15*s.* per day: that he *speaks only English*: that he had *never eat nor lodged* in the count's house, nor *received any wages*: (but as to the wages, it appeared that there were *not yet* so much as half a year's wages become due.) It was also sworn, very generally "that whilst he carried on trade " in *Ireland*, he bought goods in *England*, and sold them " in *Ireland*."

Mr. *Blackstone* observed that the act of parliament of 7 Ann. c. 12. was *not* any *alteration* of the law from what it was before; for that ambassadors and their attendants were, by the general law of nations, intitled to the same privilege.

[1479]

The 4th clause (which gives the summary proceeding against the infractors of it,) was added, he said, by the lords, as an amendment; and afterwards agreed to by the commons.

In the like manner, summary remedy was given against the violators of the law of nations with regard to safe conduct, by an old act of 31 H. 6. c. 4. which gave the summary power to the chancellor, calling to him any one judge of either bench.

And he mentioned *Grotius, de Jure Belli et Pacis*; and *Binkershoek, de Foro Legatorum*, c. 15. *de Comitibus Legatorum*: from both which writers he inferred, that the exclusion of TRADERS from this privilege was agreeable to the law of nations; and that the hanging up the *nomenclatura comitum* was also taken from that law.

He likewise cited several cases in *this court*, to shew that the NATURE of the service must be *specified*, and that no one could have a right to claim this privilege, who was not expressly and circumstantially shewn to be *fairly, really* and *bonâ fide* a domestic servant in the *actual service* of the foreign minister, and *actually performing* the service to him, *without collusion*; and who is *not a trader* of any sort, or liable to be *described as such*.

Under the former head, he cited

Widmore v. Alvarez, H. 4 G. 2. B. R. Sir J. S. 797. and *Fitz-Gibb*. 200. S. C. *Poitier v. Croza*, Tr. 23 G. 2. B. R. *Martin v. Gurdon*. (It was *Holmes v. Gurdon*, M. 7 G. 2. B. R.) and *Britnell v. Carolino*. (It was *Brettel v. Carolino*, Tr. 17, 18 G. 2. B. R. where both points now in question were fully discussed and settled.) He also cited a case of a *gardener* to a foreign minister who had *no garden*; and likewise the case of the Reverend Mr. *Shorthose*, who claimed the privilege as *chaplain* to the *Morocco* ambassador, a *Mahometan*; and also a case of *Johnston v. Stewart*, M. 1750. 24 G. 2. B. R. S. P. with the case of *Poitier v. Croza*.

1764.
TRIQUET
et al'
v.
BATH.

Which cases prove that the NATURE of the service must be PARTICULARLY shewn.

Under the latter head, he cited

Dodsworth v. Anderson, Sir T. Raym. 375. and Sir T. Jones 141. where *Grice*, who bought goods in *England* and sold them in *Ireland*, was holden to be a bankrupt in *England*.

Which case he would have applied to a fact here sworn on the part of the plaintiffs, viz. "That whilst the defendant " was a trader in *Ireland*, he had bought silk in *England*, " and sold it in *Ireland*." (But it was *not* shewn by the plaintiffs, *when* (in particular) they were bought and sold; or that the goods bought here and sold there, were the *same* goods: and the defendant swore, in his affidavit, " that he had *not* traded since the year 1756.")

[1480]

LORD MANSFIELD—This privilege of foreign ministers and their domestic servants depends upon the *law of NATIONS*. The act of parliament of 7 Ann. c. 12. is *declaratory* of it. All that is *new* in this act, is the clause * which gives a summary jurisdiction for the *punishment* * s. 4. of the *infractors* of this law.

The act of parliament was made upon occasion of the *Czar's* ambassador being arrested. If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made. An information was filed by the then attorney general against the persons who were thus concerned, *as infractors of the law of NATIONS*: and they were found guilty; but never brought up to judgment.

THE CZAR took the matter up, *highly*. No punishment would have been thought, by him, an *adequate* reparation. SUCH a sentence as THE COURT could have given, he might have thought a fresh insult. *The Czar desired that the delinquents should be put to death.*

ANOTHER *expedient* was fallen upon and agreed to: *this act of parliament* passed, as an apology and humiliation from the whole nation. It was sent to the CZAR,

1764.

TRIQUET

et al'

v.

BATH.

§ V. Post,
p. 2015.Heathfield v.
Chilton, 5th
Feb. 1767.† In Canc.
16th July,
1736.[4 Burr.2016.]
[1481]

finely illuminated by an ambassador extraordinary, who made excuses in a solemn oration.

A great deal relative to this transaction and negotiation, appears in the annals of that time; and from a correspondence of the secretary of state there printed.

BUT the act was *not* occasioned by any DOUBT "whether the *law of nations*, particularly the part relative to "public ministers, was not § *part of the law of England*; "and the infraction, criminal; nor intended to vary, an "iota from it."

I remember, in a case before Lord Talbot, of *Buot v. Barbut*, † upon a motion to discharge the defendant, (who was in execution for not performing a decree,) "because "he was agent of commerce, commissioned by the King "of Prussia, and received here as such;" the matter was very elaborately argued at the bar; and a solemn deliberate opinion given by the court. These questions arose and were discussed.—"Whether a minister could, by any "act or acts, *wave* his privilege."—"Whether being a "trader was any objection against allowing privilege to a "minister, personally."—"Whether an *agent of commerce*, or even a *consul*, was intitled to the privileges of a public minister."—"What was the rule of decision: the act of parliament; or, the law of nations." LORD TALBOT declared a clear opinion—"That the *law of nations*, in its full extent was *part of the law of England*."—"That the act of parliament was *declaratory*; and occasioned by a particular incident."—"That the "*law of nations* was to be collected from the practice of "different nations, and the authority of writers." Accordingly, he argued and determined from such instances, and the authority of *Grotius*, *Barbeyrac*, *Binkershoek*, *Wiquefort*, &c. there being no *English* writer of eminence, upon the subject. (e)

I was counsel in this case; and have a full note of it.

I remember, too, Lord *Hardwicke's* declaring his opinion to the same effect; and denying that Lord Chief Justice *Holt* ever had any doubt as to the law of nations being part of the law of *England*, upon the occasion of the arrest of the *Russian* ambassador.

Mr. BLACKSTONE's principles are right: but as to the facts in the present case, the affidavits on the part of the defendant have *out-sworn* those on the part of the plaintiffs. (And his lordship, as well as Mr. Justice *Wilmot*

(e) Qu. 4 *Inst.* 152. and a celebrated treatise by Dr. *Zouch* "*De Legati Delinquentis Judice Competente*," which has undergone several editions.

'See 3 Maule &
Selw 284; 288.

took notice, that the person who drew the affidavits on the part of the defendant, had very exactly pursued the course of the cases that had been determined upon questions of this kind; and had taken care to meet and answer all objections that might arise from them.) Lord *Mansfield* observed also, that the defendant was employed in the service of Monsieur *Hasting*, before the plaintiff took out his writ.

1764.
TRIQUET
et al',
v.
BATH.

It was not to be expected, he said, that every particular act of the service should be particularly specified: it is enough, if an actual *bona fide* service be proved. And if such a service be sufficiently proved by affidavit, we must not, upon *bare suspicion only*, suppose it to have been *merely colourable and collusive*.

As to the latter point, "of his being a trader"—His [1482] having been so in IRELAND, (and even that seven years ago,) will not bring him within the exception of the 5th clause of this act, which provides "that no merchant or "other trader whatsoever WITHIN the description of any "of the statutes against bankrupts, who hath or shall put "himself into the service of any such ambassador or "public minister, shall have or take any manner of "benefit by that act."

And there is no colour for bringing this case within that of *Dodsworth v. Anderson*:* for here is no connexion *Sir T. Raym. between the goods bought in England, and those sold in 375. Sir T. Ireland. It does not appear that they were the same Jones 141. goods; neither is any time specified, when they were bought, or when they were sold.

Per Cur.—Both RULES were made absolute; but without costs, by reason of the suspicious circumstances of this case.

CRACRAFT versus GLEDOWE.

Saturday, 3d
June, 1764.

UPON Tuesday the 15th of last month, Mr. *Eyre*, Bail must be recorder of London, shewed cause, on behalf of the put in to reverse an outlawry. sheriff of *Middlesex*, why an attachment should not issue against him, for discharging out of his custody, the defendant in this cause, who had been taken upon a *capias utlagatum*, on his attorney's engaging, under his hand, "to appear for the defendant and reverse the outlawry," WITHOUT taking security by bond in double the sum for which bail was required, pursuant to the act of 4. 5. W. & M. c. 18. § 5. which directs him to do so in all cases where special bail is required by the court.

The cause shewn by the Recorder and Mr. *Wallace* was, that the sheriff neither did nor could know that it was a case where special bail was required; nor had he

1764.
CRACRAFT
V.
GLEDOWE.

any reason to imagine it, as the *capias utlagatum* was *not marked for bail*; and they produced an affidavit of Mr. Benson who acted as under-sheriff, "that he had no ill intention or thought of collusion; but had acted agreeably to his duty, to the best of his understanding and judgment."

[1483] They urged the act of 12 G. 1. c. 29, "to prevent frivolous and vexatious arrests;" which, in its 2d section, directs "that if the debt exceeds the sum of ten pounds, there shall be an affidavit of it: and the sum for which bail is to be taken, shall be *marked* upon the process." So that, unless there be such an affidavit of the debt and *marking of the process*, it is pot, as they insisted, a case where special bail is *required* by the court.

But *if* it were a case where special bail is required by the court, how is the sheriff to *know* this, unless the process be marked? It is extremely easy to mark the process; and in the present case, the *exigent* is in fact marked: but the *capias utlagatum* is *not*. Why did they mark the *one*, and not the *other*? It now appears too, that there was an affidavit filed before the filacer. But the *sheriff* was a stranger to all this: he received the writ of *capias, unmarked*. And it cannot be supposed that he was obliged to go and look after the filacer, to procure information. It may be said, "that it would be no great difficulty put upon the sheriff of *Middlesex*, to require this of him." But the case of *all* sheriffs must be under the same rule of determination: and this might as well have been the case of a sheriff of *Cumberland* or *Westmoreland*. And in this case of a *distant* sheriff, is he to appoint an *agent* for this purpose? Or is he to trust to the *post*? And is the defendant to lie a week or ten days in *gaol* till the sheriff can receive information from the filacer?

Mr. *Harvey*, Mr. *Morton*, and Mr. *Stowe*, *contra*, urged, on behalf of the plaintiff, that this is a proceeding *by original*, in an action for money lent; and it appears that the plaintiff was intitled to bail upon the *original* process, the cause of action being *expressed* in the writ; and that special bail was required *before* the statute of 4, 5 W. & M. c. 18.

Process of *outlawry* is *not within* the statute of 12 G. 1. c. 29. "to prevent frivolous and vexatious arrests;" and so it was determined in a case in Lord *Hardwicke's* time, *M. 10 G. 2. Fownes v. Allen*, in this court. A *capias utlagatum* is not like an arrest upon *mesne* process: nor is the bond required by 4, 5 W. & M. c. 18. like the *alternative* bail upon *mesne* process, (*viz.* "to pay the money or surrender the principal;") but a bond with

one or more sufficient surety or sureties, "for appearance 1764.
 "by attorney at the return of the writ, and to do and CRACRAFT
 "perform such things as shall be required by the court."

As the cause of action was expressed in the *special writ* original; and as there was an *affidavit* of the debt, and the *exigent* marked; it was certainly the sheriff's duty, to have made further inquiry from the filacer into the *quantum* of the debt, (if he was not already satisfied about it,) before he *discharged* the defendant out of custody upon the mere undertaking of his attorney "to appear for him and reverse the outlawry." Therefore the rule ought to be absolute.

If the sheriff can meet with the defendant, he may [1484
 take him up again; but the *plaintiff* cannot sue out a *fresh writ* of *capias utlagatum*, against the defendant, after he has been *taken* on the former.

THE COURT were then clear, that this was not a case within the 12 G. 1. c. 29. And

Mr. Justice DENISON (who was then in court, though now absent,) thought the point in question had been settled. It had been determined,* he said, "that "a defendant cannot reverse an outlawry without giving "such bail as the law requires."

It was then adjourned.

This matter being now mentioned again,

Mr. Justice YATES observed, that by the 13 Car. 2. *stat. 2. c. 2. § 4*, no sheriff can discharge any person taken upon a *capias utlagatum*, without a *supersedeas* first had: (the words are "without a *lawful supersedeas* "first had and received for the same.") And by 5 G. 2. *c. 27. § 5.*, no *special writ* nor process, *specially expressing the cause of action*, shall be issued, where the cause of action (in a superior court) shall not amount to 10l. but here the *capias utlagatum* RECITES a *special original* specially expressing the cause of action.

THE COURT (Mr. Justice Denison being absent,) were very strongly inclined to be of opinion "that the "sheriff had acted improperly;" and told his counsel, that the better way would be, to *put in bail*: and in order to give opportunity for it, They

ENLARGED the RULE till Monday.

And afterwards,

The sheriff undertook to pay the debt and costs.

REX versus THE INHABITANTS OF LEEDS.

Saturday, 2d
 June 1764.

This case is already published, in my quarto-edition of
 SETTLEMENT-CASES, No. 169. p. 524.

1764.

[1485] *REX versus LATHAM, et al'*, Six of the In-Burgesses of WIGAN.Monday, 4th
June 1764.[S. C. 1 Bl.
468.]Information
quo warranto
granted to try
a doubtful
right.

UPON shewing cause why informations in nature of *quo warranto* should not be granted against these six, whose *right depended* upon that of thirteen *other* persons (who had voted in the election of them into their offices;) to shew by what right they claimed their franchise of in-burgesses of this corporation; it appeared to be incumbent upon the prosecutors to invalidate the right of three out of the thirteen, in order to turn the scale of the election. They had voted as being resident in-burgesses; but two of the thirteen were objected to by the prosecutor's affidavits, as being aldermen, and thereby disqualified to vote as in-burgesses; five, as having been legally disfranchised, and never legally restored; and six, as not being actually and *bona fide* resident in *Wigan* at the time of the election. So that it was pretended, that even *all* the thirteen were illegal votes; however, it was agreed, "that the election " would not hold good, if only *three* of these thirteen " votes could be proved bad ones." It was therefore insisted, on the part of the prosecutors, that the election was *bad*,

[5 Dm. 467.] But *besides* this, there was another *general* objection to the validity of the election; namely, that the *court*, at which the election was made, was *improperly holden*: and therefore all that was done at it, was *totally void* and an absolute *nullity*. For the prosecutors alledged and swore (to the best of their information and belief,) that it was essentially necessary to the competency of the corporate court, "that at least *ONE* of the BAILIFFS should be " present at it;" whereas there was *NO bailiff present* (as was very positively sworn) at the *original* court which was *adjourned* to the subsequent day; upon which subsequent day of adjournment the defendants were elected, at the *adjourned* court. Consequently, the *adjourned* court was (as the prosecutors alledged) an *incompetent* one, and just the same as *no court at all*; and every thing transacted at it must be *nugatory, ineffectual and void*.

They also insisted (and their opponents agreed) that it was necessary for the in-burgesses who voted, to be *resident* in *Wigan* at the time of their voting; and the only dispute was, "Whether six of those who voted for " these six defendants were *actually and fairly* so in fact, " or only *colourable and fallaciously* so."

The affidavits were very long; and the several ques-

tions that arose being much litigated at the bar, the court took time to consider.

CUR. ADVIS.

Lord MANSFIELD now declared their opinion; and said that Mr. Justice *Denison* (who was now absent) had also been consulted by them; and they were all of opinion, "that the rules should be made absolute, in order to try the rights in dispute."

The first question, "Whether the presence of a bailiff be or be not *essentially necessary* to the holding of a court," is general, and goes *directly* to the validity of the election of the defendants: and the affirmation of this on one side, and the denial of it on the other are both sworn exactly in the same manner: both sides swear to their apprehension and belief. The bailiffs are not indeed named in the *stile* of the court: but yet they may, by the constitution of the borough, be an *essential* part of the court. Therefore, as it does not appear, "whether the court at which the defendants were elected, was a competent one or not," an information must go upon *this* ground alone; unless there has been such an *acquiescence* as ought to prevent it.

2dly. Though an *acquiescence* for a great length of time may be a sufficient reason why the court should not interpose, *quieta movere*; yet *here* is no length of time. It is only three or four years. No *certain* rule is fixed for the particular and exact length of time that shall be considered as an acquiescence; and perhaps it is better, that none should be absolutely fixed; for, *circumstances* may very much vary the case, in this respect.

3dly. As to the *residence* too of the electing in-burgesses.—The facts are disputed, and therefore must be *tried*.

4thly. The disfranchised in-burgesses have been *restored by the mayor alone*, upon a *mandamus*:* but it is alledged, "that *he alone* has no right to restore them, and that he did it *contrary* to the consent and opinion of the body." Therefore their right appears to be *doubtful*.

5thly. The two that have been chosen *aldermen* are said to have *refused accepting* that office: and their rights are said to have been twice tried already, and *settled* by two verdicts; and therefore ought not to be now thus disputed and litigated over again.

6thly. It is urged, that the right of persons *elected* ought not to be sent down to trial, upon a supposition of a deficiency of right in their *electors*, UNTIL the right of such electors has been *first tried and disallowed*: and it has been questioned and debated, "how far the right of an elector who is in office and holds a franchise *de facto*, can be at-

1764.

REX v.
LATHAM
et al.

* V. post.
p. 1641.
REX v. Holmes,
mayor of
Wigan, 7th
Feb. 1765.
B. R.

[1487]

1764.

REX
V.LATHAM
et al.]

[Andr. 391.

1 Black. Rep.

471 753.

16 Vin. 114.

Cowp. 503.

3 Durn. 597.]

"tacked upon an information granted and tried against a person elected by him;" or "whether his right must then and upon that occasion be *taken for granted*, as he was a corporator *de facto* when he gave his vote."

But, as we are of opinion "that these rules must be made absolute on the *first point*," which is a general, and, if true, a *fatal* objection to the validity of the election; the information will be "*for usurping the office upon the crown*:" and the crown *may take what issues they think proper*, to shew such usurpation. There is no instance of *precluding the crown* from insisting upon *any* objections that they shall be advised to take issue upon, in order to shew the defendant to have usurped the franchise.

Therefore we neither need to give, nor *should* give any opinion upon the *other points*: nor does the line seem to be fully and clearly drawn and fixed, "*where the rights of the ELECTORS can be gone into at all, or how far they can be gone into, on the trial of the right of the ELECTED.*"

RULES MADE ABSOLUTE for informations.

The End of Easter Term 1764. 4 G. 3.

TRINITY TERM,

1488-1489

4 GEO. 3. B. R. 1764.

SWIFT, ex dimiss. NEALE, et Ux. versus ROBERTS.

Tuesday, 26th
June, 1764.

AN ejectment for a house, &c. in *Well-close square* in *Middlesex*, coming on to be tried before Lord *Mansfield*, at the sittings after last term; the following case was specially stated, and reserved for the opinion of the court.

[S.C. 1 Black.
476.]

Ambler, 617.]
Will of a joint
tenant bad.

Richard Gilbert and *Frances Sophia Gilbert*, (now *Neale*) were upon the 20th of *January* 1754, seised as joint-tenants in fee, of the premises in question. *Richard Gilbert*, on the 20th of *January* 1754, made his will, duly executed; and thereby devised, in these words—"Impri-

[See Cowp.
50, 51.]

7 Durn. 406.
1 Bosanq. 581.]

"mis, I give and bequeath *all my part, right, title and interest which I have in an estate JOINTLY WITH MY SISTER FRANCES SOPHIA GILBERT*, situate and lying in *Well-close square, &c.* to my beloved wife *Jane Gilbert*."

By indentures of *lease and release*, dated on the 9th and 10th of *October* 1754, they made PARTITION: and the messuages in question were conveyed to the said *RICHARD* in fee.

RICHARD died in *August* 1757, without issue; leaving the lessor of the plaintiff his sister and heir; who claimed as heir at law to him. The defendant claimed under his will.

The question was, "whether the plaintiff, under the circumstances of this case, is intitled to recover the premises in question in this ejectment."

It was argued, for the first time, on *Tuesday*, the 22d of *May* last, by Mr. *Ashhurst* for the plaintiff, and Mr. *Serjeant Hewitt* for the defendant: and the two questions proposed by Mr. *Ashhurst*, and disputed between them, were—

[1489]

1st. Whether the devise made to the defendant by *Richard Gilbert*, who at the time of making the devise was a JOINT-TENANT, though he AFTERWARDS made PARTITION, and had the premises for his purparty, was a good

1764.
SWIFT,
ex dimiss.
NEALE
v.
ROBERTS.

devise, *abstracted* from the consideration of the *subsequent* partition.

2d. Whether the *SUBSEQUENT* partition could make the *preceding* devise good.

Mr. *Ashhurst* argued—

First—That a *JOINT-TENANT* can not devise, (though a *co-parcener* may :) for the right of *survivorship* takes place of a *joint-tenant's* devise. This is settled established law.

For this, he relied on *Littleton*, Sect. 287. and *Co. Litt.* 185. *a. b.* both express in point.

Secondly—The deed of *partition*, made *subsequent* to the time of making the devise, cannot effectuate and make good a *prior* devise, which was a *bad* one when made.

For, upon the statutes of wills, a will must be good at the *time* when it was made: it can not be made good by any *subsequent* event.

By the statute of 34, 35 *H. 8. c. 5. § 4.* (which is explanatory of the former act of 32 *H. 8. c. 1. § 1.*) persons having a *sole* estate in fee-simple, or seised in fee-simple in *co-parcenary* or in *common*, have power to devise as much as in them of right is, at their pleasure. But as the power is only given to persons *sole* seised, or seised in *co-parcenary* or in *common*, it is clear, “that *JOINT-tenants* are EXCLUDED;” and *joint-tenancy* is a *personal disqualification*.

Upon these statutes, it is also clear, “that *no future event* can supply a defect of qualification which was “*wanting* at the time of making the will:” as an infant testator's coming to full age, or a *feme-covert* testatrix becoming sole, or an insane person's recovering sanity of mind. In all such cases, the will is void unless it be *republished* after the person becomes capable of devising.

[1490] 1 *Siderf.* 162. *Herbert v. Torball*, was so determined, upon a will made by an infant.

To make a will good, the *seisin* which the testator had at the *time* of making, must *continue*: otherwise, there must be a re-publication.

3 *Co.* 30; *b.* 31. *a. Butler and Baker's case.*

Dister v. Dister, 3 *Leo.* 108. where the testator made a bargain and sale, in order to make a tenant to the *proprice*; and suffered a recovery to his own use.

Ashby v. Laver, *Galdesborough* 93. where a renewed lease did not pass, (the former being surrendered.)

Yelverton v. Yelverton, *Cro. Eliz.* 401. A man can not grant or charge what he hath not.

Baxter v. Coke, 1 *Salk.* 237. After-purchased lands shall not pass by a prior devise.

So, in the present case, there ought to have been a re-

publication: for, at the *time* of making this will, the joint-tenant had not the estate, in the *mode* that was necessary to qualify him to *devise* it.

In *pleading*, it is incumbent to alledge, "that at the time of making the devise, the devisor was *seised in his demesne as of fee*." But if it had been so alledged here, the adverse party might have alledged a *joint-seisure*, and *traversed* the *sole seisure*.

He added further, that *supposing* this devise to have been good in its original creation, yet the subsequent partition, which was made by deed of *lease and release*, would amount to a *REVOCATION* of it.

And he endeavoured to shew this, by citing 1 *Re. Abr.* 614. *Title Devise*, Letter O. (which does not prove it,) and the case of *Le Strange v. Sir Richard Temple*, 1 *Keb.* 357. and 1 *Siderf.* 90. and a case in *Shower's P. C.*

But as to *this* point, he was over-ruled immediately by Lord MANSFIELD and Mr. Justice WILMOT, who both agreed, that it had been determined "that a partition by deed, between tenants in common, did not amount to a revocation;" and they particularized two cases in point, *viz. Luther v. Kidby*, 3 *Peere Wms.* 169, 170: 9th April 1730, (mentioned there in a note,) and *Risley v. Lady Bellinglass*, Sir T. *Raymond* 240. Each of these two cases being the unanimous opinion of four judges. And Lord Mansfield added an observation, "that *constructive* revocations, contrary to the intention of the testator ought not to be indulged; and that some *over-strained* resolutions of that sort had brought a scandal upon the law." (a)

Mr. Serjeant Hewitt for the defendant.

As to the *last* point, he thought it needless to say any thing at all about it; as the two cases last above mentioned were a full proof, "that a partition between tenants in common was no revocation of a prior will:" and there was no difference (in this respect) between tenants in common and joint-tenants.

As to the 1st point—A joint-tenant has such an estate as he *may devise*, under these two statutes concerning wills.

He cannot indeed devise, so as to defeat the survivor, so long as *survivorship continues*: but if the *survivorship* be put out of the case, then there is nothing to hinder him from devising.

(a) See 7 *Durn.* 410. 8 *Fin.* 148, 149. *Str.* 1683. and 4 *Burr.* 1960. Also Lord Hardwicke in 3 *Atk.* 176. seems to have been of the same opinion, though he would not speak plainly that he was so.

1764.
SWIFT
ex dimiss.
NEALE
V.
ROBERTS.

[1491]

1764.
SWIFT
ex dimiss.
NEALE
v.
ROBERTS.

Now a partition discharges, destroys, and *extinguishes* this incident or incumbrance of *survivorship*. If one joint-tenant *releases* to the other; (as he may do,) this *extinguishes* his estate.

All this is consistent with *Littleton* § 288. and *Co. Litt.* 186.

And *Perkins* (section 500) is express, that "if a joint-tenant makes his will and *survives*, the will shall stand "good."

2d Point. AFTER *partition*, the joint-tenant is in of the *old* estate: the partition operates only as an *extinguishment* of the other moiety.

And as to the expression in 34 and 35 H. 8. of. "*having a sole estate*;" he was sole seised of his *own part*, and had power to dispose of it: he might alienate it, demise it, forfeit it. Why then might he not *devise* it?

Mr. *Ashhurst*, in his reply, *did not insist* upon the partition's amounting to a *revocation* of the will: (though Lord *Mansfield* told him, he was at liberty to do it, if he was not satisfied about it.)

As to the rest, he said that joint-tenancy is a *personal disability* to devise the land; as infancy, insanity, or coverture are, to do so: and it is *tacitly excluded* by the [1492] statute, by *not* being therein expressed, as co-parcenary and tenancy in common are.

It is no argument to prove his power of devising it, to "say that he *might* have *given* it or *aliened* it in his *lifetime*:" for, *that* would have *defeated the survivorship*; but *this* does not.

As to the passage in *Perkins*, § 500. It may be laid out of the case: for, his assertion is *not supported* by the authorities he cites. (Mr. *Ashhurst* said he had looked into the books referred to by *Perkins*; and could find no such thing * in them.)

* Perhaps he looked into Fitz-Herbert's *Natura Brevium* instead of the old *Natura Brevium*.

2d Point. AFTER *partition*, the *mode* of the deviser's having the estate is *altered*; and the will must be *published anew*.

Uterius Concilium.

This cause now stood in the paper for a second argument. Mr. *Morton* was for the lessors of the plaintiff; and Mr. *Eliab Harvey*, for the defendant.

THE COURT put it upon MR. HARVEY, to shew how he could get clear of the *statute* of the 34 and 35 H. 8.

Mr. *Harvey* endeavoured to do it, by urging that the testator being sole seised at the *TIME when the devise OPERATED*, that is to say, (at the time of his *death*) it is a good devise under the statute of H. 8.

And this, he said, depended upon the *quality of the estate*, and not upon the *personal ability of the testator*.

Where it depends upon the *personal ability of the testator*, it is *not* indeed sufficient that the disability be removed before the time of the operation of the will: it is necessary that the testator should have been free from all disability at the *time of making it*. But where it depends, upon the *quality of the estate*, it then turns upon the time of the will's *operating*. And in the present case, which is of this latter kind, the testator was *sole seised at the time of the operation* of his will.

1764.
SWIFT
ex dimiss.
NEALE
v.
ROBERTS.

Before the making of these statutes of wills (in 32 and 34 H. 8.) *Noue* could devise their inheritance, by the general laws of the land: but in most cities and boroughs, the right of doing it *subsisted*; and many questions were agitated concerning such devises; and many rules were laid down, and many principles established about them. One of those established principles was "that a joint-tenant could not devise;" or (in other words) "that a person must be *sole-s-ised*, in order to qualify and enable him to devise lands." And the intent of these statutes was, "to make the general law of the land conform to these local customs."

[1493]

Upon the former of these two statutes (*viz.* the 32^d of H. 8.) it was left *doubtful*, "Whether a joint-tenant could devise by virtue of *that act* or not;" the power being given to "every person having any manors, lauds, or tenements holden in socage:" and the act of 34 and 35 H. 8. was made to explain this doubt; and gives the power of devising, "to persons having a *SOLE* estate in fee-simple, or seised in fee-simple in *coparcenary*, or *in common*." So that it is now established by this latter act, which adopts the known principles of the common law, "that a joint-tenant can *not* devise." And this is a remedial law, and therefore to be favoured; in order to promote the remedy, and effectuate the intentions of testators.

The reason why a joint-tenant cannot devise, is that the right of survivorship takes place in his companion immediately upon the devisor's death; and the surviving companion is *paramount* the title of the *devisee*, who can only claim *under the devisor*; whereas the survivor claims in his own right *under the first feoffor*. So is Littleton § 287. and Co. Lit. 185. b. in his comment thereupon. And this *paramount* right having instantly prevailed, upon the testator's death, there remains *no* estate of inheritance for the devise to operate upon.

BUT, if *between* the time of *making* the devise and the time of its *operating*, the *jointure* be severed, and the estate consolidated, then the devise will be good: for, there now remains *no* paramount right, to prevail over it.

1764.
SWIFT
ex dimiss.
NEALE
v.
ROBERTS.

THIS doctrine is quite agreeable to *Littleton's* opinion just cited: and it is also the opinion of *Perkins*; who in his 500th section, title *Devises*, says, "that a devise by a joint-tenant, of land devisable which he holds in fee on the day of his death jointly with a stranger, is not good; and the law is the same, with regard to an use in jointure, &c. But if such devisor survives all his joint-companions, then such devise is good; as it is well shewn by my Lord *Littleton*, in his 3d book in the chapter of Joint-tenants folio 58, and also in *Natura Brevium*, with the additions upon the writ of *ex grati querela*, &c. where there are several good cases, concerning devises put and shewn, &c." *Perkins* is clearly of opinion himself, and he deduces it also from *Littleton*, that if a joint-tenant makes his will, and afterwards survives his companions, then such devise is good."

[1494]

THUS it stood at common law, antecedent to the statute. And the statute adopts and proceeds upon the reasoning of the common law; and meant to make the law throughout the kingdom conformable to it in every respect: it does not destroy the former power of devising, which subsisted only partially, and not generally; but, on the contrary, establishes the like power, generally and all over the kingdom.

Upon this principle, the ESTATES must be considered, as they stood at the time of the operation of the will. And for that reason, no livery is necessary, nor attornment. (V. 3 Leon. 276, 277. *Egerton's* argument of *Butler* and *Baker's* case.)

A tenant in tail, with remainder in fee in contingency, may devise: and if he leaves no issue at his death, his devise shall be good.

The case of lapsed devises, (where a devisee in fee dies in the life of the devisor,) tends to prove this point: but a much stronger instance is the case of a man's devising to his own wife; which can only be supported upon this foot of considering the estate as it stood at the time of the will's operating. So if a devise be "to the heir of A." and A. dies in the life-time of the testator; A.'s heir shall take.

THE present case turns upon the quality of the estate: and therefore the devise is good, without re-publication or any other act done; as the testator was sole-seised at the time of the operation of the will.

Indeed where it depends upon the personal ability or disability of the testator, some other act must be done, after the disability is removed: as if a will be made by a feme-coverte, an infant or a mad person, it must be re-published after the disability is removed.

But where it depends upon the quality of the estate, the

estate is *disencumbered* by the removal of the disabling circumstances: and it is enough if it be clear of any incumbrance at the time when the will *operates*. Here, the devisor was in to the same uses after the partition, as he was before; his intention remained the same as it was before; and the establishing the devise he has thus made will not clash with any rule of law.

Mr. *Morton*, for the lessor of the plaintiff.

As to *Perkins*—His words do not import even his *own* opinion to be, “that the *very identical* will made by the “surviving joint-tenant *before* the death of his companion would be good *after* it:” he only means, “that if “a joint-tenant survives all his companions, he may “*then* make a devise of the land before holden in jointure; “which he could not do before.” Nor can any such opinion as is ascribed to him by Mr. *Harvey*, be inferred from the books cited by Mr. *Perkins*.

As to devises by *tenants in tail*—If a man has an estate tail and destroys that quality, and acquires a fee, such *acquired* fee will *not* pass by a prior will, without republication. In the particular case put by Mr. *Harvey*, of a tenant in tail, with remainder in fee to himself and his heirs, the estate would pass by the very words of the statute of wills; because the devisor *then* had a fee in the remainder; and the words of the statute are—“*Having a sole estate in fee-simple, &c. in possession, reversion, or remainder.*” But such deviseable estate must be either a sole estate in fee-simple, or a fee-simple in *coparcenary* or in *common*. Whereas, *at the time* of Mr. *Gilbert*’s making this devise, he had *not* such an estate as the statute intends: for he *then* held in *joint-tenancy* with his sister; and the *express* bequest in his will is “*what he had jointly with his sister.*” (b)

Suppose Mr. *Gilbert* to have *survived* his sister, would the *whole* have passed by the present will? Certainly not. And if so, how can his *own share* pass by it?

(b) See 3 *Brown* 30, *Cont.* In the case of a remainder limited to the survivor of the husband and wife and the heirs of the survivor, the limitation was in a settlement made before marriage, but to take effect on the marriage; therefore it seems they took by *entireties*, as if the limitation had been after the marriage, otherwise had the limitation taken effect before the marriage, they would have taken as joint-tenants, *Co Litt.* and then the devise would have been void, unless there be a difference between a devise of a rent out of an estate, which was the case there, and a devise of the estate; and there seems no ground for making such distinction.

1764.
SWIFT
ex dimiss.
NEALE
V.
ROBERTS,
[1495]

1764.
SWIFT
ex diuissa,
NEALE,
v.
ROBERTS.

The general doctrine advanced by Mr. Harvey came in question in the case of *Butler v. Baker*, reported in 3 Co. 25. and *Popham* 87. And *Popham* and *Anderson*, the two chief justices, and all the other justices and barons, held (contrary to *Periam*, *Clench*, *Clark*, *Wulmesley*, and *Fennor*) "that they were to consider what estate the devisor had in the land *at the time of his devise MADE WITH- OUT regard to that which might happen by matter ex post facto* upon the deed of another: and *at the time when that will was made*, the devisor had no other estate in the manor of *Hinton* than *jointly* with his wife; and *if so*, it follows that the manor of *Hinton* was then out of the letter and intent of the law; for, he was *not then sole seised thereof*, nor seised in coparcenary nor in common; and, by the words, he should be *sole seised in fee-simple*, or seised in fee-simple in coparcenary or in common." (See particularly *Popham* 87. and 3 Co. Rep. 30 b. 31.)

[1496]

THE COURT, consisting of Lord Mansfield, Mr. Justice Wilmot, and Mr. Justice Yates, (for Mr. Justice Denison was absent,) were clearly and unanimously of opinion, that a will made by a JOINT-TENANT during the continuance of the jointure, is not a good will (even as to his share of the estate,) under the statute of wills in 32 and 34 H. 6. notwithstanding a subsequent severance of this jointure by a partition made after the time of making the will, and before his death; UNLESS there be a republication of it, after the partition: and they observed, that the devisor has expressly described this bequest as a right "which he had in the estate jointly with his sister."

They all thought that this would have been a pretty plain case, if it had stood merely on the statute of 32 H. 8. which enacts, "that every person having any manors, lands, or tenements holden in socage, &c. shall have power to give and devise, &c." And consequently there was no necessity of the latter act of 34 and 35 H. 8. to explain the former. But this latter explanatory act clears the matter of all doubt. It professes to be made on purpose to remove all doubts about the exposition of it, and to declare and explain its meaning: part of which declaration and explanation is this, "that all and singular person and persons HAVING a sole estate or interest in fee-simple, or seised in fee-simple in coparcenary, or in common in fee-simple, &c. &c. shall have power to devise, &c." It is very clear, upon this statute, that the devisor must HAVE the estate *at the time of MAKING his will*: he cannot devise what he had *not in him* at the time of devising. Lord MANSFIELD said

[2 Dec. 77]

that by the *feudal* law there could be no devise of land, as constituting an heir: but a devise of land was considered as a limitation of the devisor's estate by a revocable act; and upon the custom, and independently of the statute, a man could not limit an estate which he had not. And Mr. Justice Yates observed, that the manner of pleading a devise of lands shewed that the devisor must be seised of them at the time of making the devise: for the form of such pleading is, "that the testator was seised, &c. and being so seised, made his will, and thereby devised so and so."

The question therefore is, "whether Richard Gillert had a devisable estate in these premises at the time when he made his will."

And they were unanimous, "that he had not:" for it was only a joint estate; which is not devisable. They all were clear, "that a joint-tenant cannot make a will of what he holds in jointure." And Lord Mansfield held, [1497] "that such a will would be void, both at common law and upon the statute." If it could operate at all, he said, it must operate as a severance of the jointure: for it could not operate otherwise. But it cannot operate in that manner; because a severance of jointure cannot be effected by that method. A feoffment to uses (which the statute means when it speaks of an act executed in the person's life-time,) would have severed the jointure: but a will cannot have that effect. Where it took place by [1 Bosanq. 579] particular customs, it was in the nature of a revocable appointment or limitation of the land *causa mortis*; and not like the Roman testament, as a constitution of the heir. Therefore, before the statute, a man, by custom, could only devise lands, which he was then seised of. Mr. Justice WILMOT said, that the time of making the will was the material time, in this case as well with regard to the quality of the estate, as to the personal ability of the testator: for by the express words of the statute of 34 and 35 H. 8. he must have the estate, in order to be capable of devising it: and the word "having" is a reason why an after-purchased estate should not pass. Now this man, who only held in jointure at the time when he made his will, had not a devisable estate, when he made the devise: which it was necessary that he should have had, at the time of devising, in order to make the devise good. [3 Durn. 92.]

As to the passage cited from PERKINS 90 b. title *Devise*, section 500. (which see at large, *antè*, p. 1493.) They were extremely well satisfied, that it could not be true, in the sense in which Mr. Harcey would have it understood; namely, "that, if a joint-tenant, who holds devisable land jointly with other persons, makes a devise of such land, and afterwards happens to survive

1764. " all his joint companions, then such *before-made devise*
 SWIFT " shall *thereby* BECOME a good one, (though it was con-
 ex dimiss. " fessedly a bad one before this event,) *without* being
 NEALE, " renewed or republished, or any other confirmatory act."
 V. The books he cites do not warrant any such conclusion :
 ROBERTS. nor is there any foundation for supporting such a propo-
 [Eq. Abr. 172. sition. And (as Lord Mansfield observed) it would be
 Cas. 8.] absurd upon the face of it, to suppose that such a devise
 could be good for the *whole* of the estate. And both his
 lordship and Mr. Justice Wilmot remarked, that what
Perkins says relates to *customary* devises only, and not to
 devises under the *statute*: so that it has still the less
 weight upon the present occasion.

N. B. It seems to me, that *Perkins* meant no more
 than this; that a joint-tenant, who *continues till the*
day of his death to hold jointly with one or more
 other person or persons, can *not* devise: but if he sur-
 vives all his companions, he then and thereby be-
 comes CAPABLE of *devising*. And I apprehend, that
 he only cites *Littleton* and old *Natura Brevium*, in
 order to prove "*that a devise by a joint-tenant is void*;"
 and that he considers the latter part of his assertion,
 as a plain consequence of the former, and obviously
 clear *without* any proof.)

Per Cur.'

Let the *postea* be delivered to the PLAINTIFF.

Friday, 29th
 June, 1764.

[S. C. 1 Black.
 489]

Carriages
 standing at
 livery may be
 distrained.

FRANCIS *versus* WYATT.

THIS was an action in *replevin*, upon a *distress for*
rent.

The *replevin* was brought by Mr. Francis, the owner
 of a *chariot* which stood in a *coach-house* belonging to
 and part of *Mat. Wilkinson's* LIVERY STABLES; which
 chariot Mr. Wyatt, the *landlord* of the premises, had *dis-*
trained for rent due to him from *Wilkinson*: and *Wyatt*
avowed the taking of it as a *distress for rent*. To this
 avowry, Mr. Francis pleaded in bar, that the *coach-house*
 in which it was taken, was part and parcel of certain
 other *coach-houses* and *stables* known by the appellation
 of the *Talbot livery-stables*: whereof one *Matthew Wilkin-*
son was the tenant and occupier, under a demise from
 the avowant Mr. Wyatt, for a term of years, at the annual
 rent of 50*l.* that *Matthew Wilkinson*, during such his
 occupation of the premises, used and followed the trade
 and business of a *common public livery-stable keeper*, for
 keeping gentlemen's horses and setting up their coaches
 and carriages; and used the premises, in his said trade
 and business, for the keeping common public livery stables

and coach-houses, for keeping gentlemen's horses and setting up their coaches and carriages; and that the plaintiff Mr. Francis set up his chariot there, *at livery*, with the said Matthew Wilkinson, as at a common public livery-stable keeper's; and that the avowant took his chariot so standing in the said coach house, as a distress for rent due to him from the said Matthew Wilkinson: and so concludes, that he took it of his own wrong. To this plea in bar to the avowry, Mr. Wyatt the avowant demurs: and Mr. Francis joins in demurrer.

.1764.
FRANCIS
V.
WYATT.

And the question was, "whether a gentleman's chariot which stood in a coach-house belonging to a common livery-stable keeper, was DISTRAINABLE for rent due to the landlord from the livery-stable keeper, for this coach house, which (together with the stables, &c.) he rented of the landlord who distrained it." [See 4 Durn. 566.]

[1499]

This point was twice argued, first, on Friday the 25th of May last, by Mr. Serjeant Nares for the landlord, and Mr. Ashhurst for the owner of the chariot; and again on Friday 29th June 1764, by Mr. Blackstone for the avowant (the landlord,) and Mr. Clayton for the plaintiff in replevin, (the owner of the chariot.)

Upon the first argument, the serjeant insisted, that a LIVERY-STABLE-keeper differs widely from an INN-keeper; and that even HORSES standing at livery in a livery-stable would not be intitled to the like privilege from being distrained for rent due for the livery-stables, as a horse put up at an inn would be, from being distrained for rent due for the inn; and much less can a CHARIOT without horses, put up in a coach-house belonging to and parcel of a livery-stable, be intitled to such privilege.

An INN-keeper has a right to detain the horse till he be paid for his keeping. The reason is, because the inn-keeper is bound to receive the horse: and he gives credit to the thing, not to the person. So a farrier, who shoes a horse. So a common carrier. So likewise a taylor; who is bound to make the cloaths. 22 Ed. 4. 49. [14 Vin. 438.]

But it must be the horse of a guest or traveller, left at an inn and fed, which the inn-keeper may thus detain: he cannot detain goods left with him. 2 Ld. Raym. 867.

Whereas here is a coach-house rented for a year, not occasionally used for a small time only: and the credit is given to the person, not to the thing. Moore, [877.]

In a case of *Brenan v. Currint*, in B. R. Tr. 1755. 28 G. 2. A farrier insisted on retaining a horse, for his keeping and cure. The court entered into the general doctrine, and determined (upon the case in *Cro. Car.* 271, 272. *Chapman v. Allen*,) "that the farrier could not re-

1764.

FRANCIS

v.

WYATT.

"tain the *thing*; because there was a *special agreement*,
"and the credit was given to the *person*."

But a LIVERY-STABLE-keeper cannot detain a horse
(as an inn-keeper may;) because he is *not bound to take in*
a horse: much less can he detain, or is bound to take in,
a *chariot without horses*.

[1500]

A LIVERY-STABLE-keeper is not bound to *quarter*
soldiers, as an inn-keeper is. 1 Salk. 387. *Parkhurst v.*
Foster.

Neither are LIVERY-STABLE-keepers liable to the *incon-*
veniences that inn-keepers are liable to; as taking out
licences, and a great number of other inconveniences.

Therefore they ought not to enjoy the same privileges:
nor is there the same foundation for their *under-tenants*
to claim any *exemption* from the *general right* which
landlords have "to distrain what they find upon the
"premises." And this gentleman, Mr. Francis, is nothing
more than an *under-tenant* to Wilkinson for this coach-
house.

A LIVERY-STABLE keeper must rest upon his own
agreement: he has *no privilege* himself; and none can be
claimed under him. *Yelverton* 66. *Case de Hosteler*; *Cro.*
Car. 271, 272. *Chapman v. Allen*; 2 *Ld. Raym.* 687.
Yorke v. Grenough; and 1 *Salk.* 388. *Yorke v. Grindstone*,
S. C. *Cro. Jac.* 188, 189. *Gelley v. Clerk*, and in a case of
Crosier v. Tomlinson, in *C. B.* at the *Essex* (or *Hertfordshire*)
assizes before *Ld. Ch. J. Willes*, a race-horse was holden
liable to distress; in a stable at *Barnet*, let to an inn-keeper
for a guinea.

Mr. Ashhurst, *contra*, for the plaintiff in replevin, (the
owner of the chariot,) argued, that the doctrine of *retainer*
is uncertain, and not applicable to the present case. And
he denied that the inn-keeper's *right to detain* was founded
upon the principle of his *obligation to receive*. For a *ma-*
nufacturer (who is not bound to accept the work) has a
right to retain; (as was holden in *P. 9 W. 3. Collins v.*
Ongley, before *Holt Ch. J.* cited by *Lord Ch. J. Ryder*
in the case of *Brenan v. Currint*;) so has a *factor* also.
And *taylors* are *not bound* to make cloaths for all who
ask them.

The *right* of landlords, "to distrain the property of a
"third person for rent due from their own tenants," is
founded upon reasons of *public convenience*, and calculated
for the prevention of fraud: and the *exceptions* out of the
general rule are, all of them, tending to the *benefit of trade*
and *commerce* and general advantage.

Co. Litt. 47. a. 2 *Lutw.* 1578. *Kimp v. Crawes et al.*
1 *Rol. Abr.* 668. Letter J. Title "Le biens de que poient
"estre distraine." 2 *Bulstr.* 270. *Robinson v. Walter*,
Cro. Eliz. 596. *Rede v. Burley*.

But there is no case directly in point.

As to the case of *Crosier v. Tomlinson* at Hertford assizes, the only question was, "whether the stable was or "was not parcel of the inn": and it was holden, "that it "was not." It was a mile distant from it. That case therefore is not applicable to the present.

Mr. Serjeant *Nares*, in his reply, observed, that there was no surprise upon the owner of this chariot: he was fully apprized of the fact of its being a livery-stable, and not an inn.

And he cited 3 *Lrr.* 260, 261. *Fowkes v. Joyce*.

UPON the second argument, Mr. BLACKSTONE, on behalf of the avowant (the landlord) argued, that no privilege of exemption from being liable to distress for rent in arrear, could be claimed by the owner of the chariot, but upon one of these foundations, viz. either the analogy between a livery-stable and a common public inn, or the principle of general utility and convenience to the community.

1st. As to the former—An inn is *publici juris*: and every man has a right to put up at it. Formerly it has been questioned "whether a man could have erected an "inn, at his own pleasure," (as it should seem :) at least it appears that common inns are so much devoted to the service of the community, that they are obliged to receive all guests and horses. 3 *Bulstr.* 269. *Robinson v. Waller. Palmer*, 367. and 374. *Rex v. Collins and three others*, and 2 *Ro. Rep.* 345. S. C. And the protection that they receive from the law is founded upon their being compellable by law to take in guests and horses. But that is not the case of a livery-stable-keeper. He is not bound, obliged, or compellable to receive coaches or horses: he stands upon the foot of private contract only; and may refuse to take in coaches or horses unless upon his own terms. There is no reason therefore why he should receive or be at all intitled to any particular or special privilege, protection or exemption from the law. And the addition of the epithets "common" and "public," to the description of this livery-stable keeper and his coach-houses and stables, makes no real difference in the case. The distinction between the obligation by law, and the standing upon the foot of private contract, is clearly shewn by Chief Justice Popham, in the case *De Hosteler*, *Poph.* 66. In *Bro. Abr.* Title "*Distresse*," p. 251. pl. 56. *Brian Ch. J.* puts the privilege of exemption of cattle or goods from being liable to distress, upon their being in the place by authority. And so also, 1 *Ro. Abr.* 668. Title "*Distress*." [1502] Letter J. pl. 12. declares the reason of the exemption to be "because the law gives liberty to put them there." Lord Ch. J. Coke likewise, in *Co. Litt.* 47. a. gives the

1764.

FRANCIS
V.
WYATT.

1764.
FRANCIS
V.
WYATT.

same reason, viz. their being there "by authority of law." But in the present case, the chariot was *not* in this coach-house by authority of law, but on a mere *private contract*.

2dly. As to *public utility or convenience to the community*—No cases can be cited to support a notion, "that a privilege of exemption from a distress for rent can be maintained upon *this foot*."

If this chariot had been sent to a coach-maker's *to be repaired*, and had been distrained there for rent due from the coach-maker, *that case* might have seemed to fall within some of the cited cases: *that* would have afforded a pretence to exemption, from the *necessity* of sending it thither for that purpose. But there is *no necessity* that a gentleman lies under, to set up his chariot at a *livery-stable*. And the *inconvenience* would be much greater on the side of the *landlord*, if he should be *debarred of his legal right* "to distrain goods found upon his premises, for rent in arrear," than any that could arise from allowing him this established security for his rent, in the case of a person who appears to be no more than an *ordinary under-tenant*, and without any reasonable *pretence* of exemption from the general law of distresses.

Therefore he prayed judgment for the avowant.

Mr. Clayton, *contra*, (for the plaintiff in replevin,) premised, that it stood admitted on the pleadings, "that this *Matthew Wilkinson* (the tenant) kept a *common public livery-stable*." And he argued, that *such a livery-stable* is exactly upon the foot of a *common inn*, and intitled to the *very same* privileges and exemptions; and is equally to be protected upon the principles of *necessity, utility and convenience to the community*, though of more recent establishment indeed than inns: and therefore *such a livery-stable* is equally within the *reason* of the cases, as inns are; like *new trades*, which are under the *same* protection as *old* ones. Consequently, such a livery-stable is equally within the general reason of *exemption from distress*,

[Barnes, 472.] for the sake of *public utility*, as cloth at a taylor's, cloth at a weaver's, a horse at a farrier's (to be shod,) a horse that brings goods to market to be sold, the goods themselves so brought, goods on a wharf or at a warehouse for

[L 1503] exportation, goods delivered to a carrier to be carried for hire, wool in a neighbour's barn, goods in the hands of a factor. In all these cases, the law gives the privilege in respect to *trade and utility*: the privilege or exemption is *not founded* on any *OBLIGATION* to receive the goods or other things. A *factor* is not bound, to receive goods: yet he may retain them. Nor do I know that a taylor is bound to make my clothes; or that a farrier is obliged to shoe my horse. And to prove "that the *true foundation*

" of the exemption from distress, in the exempted cases, " is the *detriment the common-ueal, would suffer* if such " things should be liable to distress for rent," he cited *M. 7 H. 7. 1. Fitz-H. Abr. 295. Tit. " distresse," pl. 8. Noy. 19. Trassell v. Morris, Co. Lit. 47. a. Cro. Eliz. 549. Read v. Burley. Salk. 249, 250. Gisbourn v. Hurst.*

1764.
FRANCIS
v.
WYATT.

And here it appears, that the landlord *knew* this to be a *common livery-stable*, and *consented* to it.

Mr. *Blackstone*, in reply, observed, that there is no such thing known in the law, as a *common livery-stable*, in any *technical* sense of the word " *common*," or in the *same* sense in which it is applied to an inn (which is called *commune hospitium*.)

He said, Mr. *Clayton* had compared the present case to many others which it did not at all resemble, and in which the exemption is founded upon very sufficient reasons; and a very good rule is laid down for such cases, in 1 *Salk. 250.* (where goods delivered to a carrier were holden to be privileged,) viz. " That the law has given the privilege, in respect of the *trader* : " but those reasons are not applicable to *this* case; no more are any arguments drawn from a right of *retaining goods, &c. till payment or satisfaction.* This case does not at all differ from that of goods put into a *common lodging-house*, and *there* distrained by the landlord for rent in arrear.

Lord MANSFIELD and the two judges * present saw this question in such a light with regard to the consequences of it, and the inconvenience that might attend it, *even to the landlords, owners, and keepers* of these livery-stables *themselves*, as well as to gentlemen who used them, (in case this distress should be *solemnly adjudged* a good one,) that they intimated to the landlord (the avowant) who happened to be personally present, attending the event of this cause, that it might be well worth his while to consider, whether it would be for his *own* interest, to wish, " that judgment should be *formally* pronounced " for him." * Mr. Justice Wilmot, and Mr. Justice Yates.

But Mr. *Clayton*, who was counsel for Mr. *Francis*, (the plaintiff in replevin,) informing them that the attorney general was retained to argue the point on his side.

[1504]

THE COURT ordered an

Uterius Concilium.

However, Mr. *Francis*, perceiving the opinion of the court to be flatly against him, did not think proper to bring the question to a third argument. [Judgment was afterwards given for the defendant, 3 Bl. Rep. 485]

And indeed it seems extremely clear, that his chariot *was* liable to this distress; and that there is not the least shadow of *legal* claim for an exemption.

1764.

JOHN late BISHOP of LINCOLN, now BISHOP of SALIS-
BURY, *versus* WOLFORSTAN.Friday, 29th
June, 1764.[S. C. in C. B.
2 Wils. 174.
S. C. 1 Bl. 490.]Grant of an
advowson af-
ter actual
vacancy void.
* See all the
pleadings at
large, in Mr.
Serjeant Wil-
son's Reports,
part 2d.
p. 174. to 179.
And also the
three argu-
ments in C. B.
and the judg-
ment there,
ibidem, p. 172
to 202.

THIS was a writ of error from the Common Pleas, upon a judgment given there against the Bishop of Lincoln, and Thomas Whitehead his clerk, in a *quare impedit* brought by the grantee of the advowson, in fee, of the church of Great Sheepy: in which *quare impedit*, the * pleadings had gone on to a plea, a replication, and a rejoinder: to which rejoinder there was a special demurrer, and joinder in demurrer: and the judgment below was given against the bishop upon the badness of his *rejoinder*. But it now appeared manifest to this court, that the *plea*, and the *replication*, and the *rejoinder* were all of them bad; so that it stood, here, upon the DECLARATION only. The declaration set forth a grant of the advowson made to the plaintiff, in fee, by the persons seised of it, on the 9th of November 1759. It then set forth the statute of 21 H. 8. c. 13. § 9. against pluralities; and stated the facts necessary to shew his right to the action; viz. an avoidance of the church, and his own presentation thereupon, and the refusal of his presentee by the bishop.

The particulars of the facts stated were—That Great Sheepy is a rectory, a benefice with cure of souls, of above the yearly value of eight pounds. That Thomas Griesley, the incumbent, accepted and took another benefice with cure of souls, namely, the living of Seale: and was instituted, admitted and inducted in possession of the same. That thereupon the plaintiff below presented Thomas Hall to the rectory of Great Sheepy: who tendered himself to the bishop, and was refused by him.

The bishop's plea (which was a bad one) admits the incumbency of Griesley, and his acceptance of the living of Seale; but supposes the avoidance of his former church to have been by his INSTITUTION to the second, on the 31st of October 1759: and then, by computing from the INSTITUTION, shews that six months elapsed: whereupon he collated Thomas Whitehead to it, by *lapse*, on 20th of June 1760.

The replication (which was an informal one) specifies the time of Griesley's INDUCTION to Seale to have been upon the 22d of December 1759; and alleges that upon the 20th of June 1760, the day when the bishop collated his clerk, Mr. Thomas Whitehead, six months from the INDUCTION of Griesley to Seale had not elapsed.

The bishop's rejoinder insists upon the lapse occurring at the end of six months from the time of Griesley's INSTITUTION to Seale; and traverses his refusal of Hall before he himself had collated his own clerk, or that Hall tendered himself to him before he had collated the other,

[1505]

or within six months after the INSTITUTION of Griesley to Seale.

To this rejoinder the plaintiff demurred, both generally and specially; and the bishop joined in demurrer.

Mr. Blackstone argued for the plaintiff in error (the bishop;) and he said, that the real question (if it could be cleared from the special pleadings) was, "whether the plaintiff in the *quare impedit* had a right to present for this turn." And he endeavoured to shew, "that he had not," for these two reasons; first, that the church was VACANT at the time when the grant was made to the plaintiff; so that he had no sort of right to present; secondly, that six months had elapsed from the time of Griesley's INSTITUTION to the living of Seale: and that the plaintiff's presentee did not tender himself within that time, or before the collation of Whitehead by the bishop by virtue of the lapse; which lapse incurred (as he insisted) at the end of six months after Griesley's INSTITUTION to the second living.

He observed upon the plaintiff's replication, "that it was informal, by introducing new matter, viz. Griesley's induction to Seale upon the 22d of December 1759;" whereas the question depends (as he hoped to prove) upon Griesley's institution, not upon his induction to this second living. (a)

He then stated the facts, as they appeared upon the pleadings, to stand thus—That Griesley, being incumbent of Great Sheepy, was instituted into the rectory of Seale on the 31st of October 1759. That he was inducted to it on the 23d of December 1759. That the grant of the next presentation to the rectory of Great Sheepy was not made to the plaintiff till the 9th of November 1759; (at which time the church of Great Sheepy was, as he insisted, become vacant by the INSTITUTION of Griesley to Seale upon the preceding 31st of October.) That the plaintiff presented Hull to Great Sheepy, upon the 29th of March 1760; but that Hull did not tender himself to the bishop within six months after the institution of Griesley to Seale, nor before the bishop had collated his clerk. And that the bishop collated upon the 20th of June 1760; (at which time, more than six months were elapsed since Griesley's INSTITUTION, though it was within six months from his induction.) From these premises he inferred, that, as the church became actually vacant upon the 31st of October, the plaintiff could

1764.
BISHOP OF
LINCOLN
Y.
WOLFOR-
STAN.

(a) Because the allegation in the count of the time of the induction was as appears in 2 Wils. 170, under a to wit.

1764.
BISHOP OF
LINCOLN
v.
WOLF-
STAN.

[Cro. Eliz.
811. acc.]

claim no right to present to it, under a *subsequent* grant made in *November*: and that the bishop had, upon the 20th of *June*, a right to collate *by lapse*, no presentation at all having been then *tendered* to him.

1st. The *grant* (by a subject) of the next presentation to a church, or of the advowson in fee, (for there is no difference between them, in *this* respect,) *AFTER the church is actually fallen vacant*, is a *void* grant *quoad the fallen vacancy*; both because it is a *chose in action*; and also because it tends to *simony*.

Cases in point to this effect, are *Hil. 28 H. 8. Dyer*, 26. a. pl. 165. 11 *Eliz. Jenkins's Cent.* 236. case 13. S. P. by all the judges of *England. P. 11 Eliz. Dyer*, 292. b. pl. 28. S. P. M. 39, 40 *Eliz. Cro. Eliz.* 600. *Bennet v. Bishop of Norwich*, M. 42, 43 *Eliz. Baker v. Rogers*, *Cro. Eliz.* 788. S. P. (b) P. 2, 3 *Ph. & M. Agard v. Bishop of Peterborough*, 1 *Anders.* 15. S. P. twice. *Dyer*, 129. b. pl. 66. S. C. *Moore*, 12. S. C. and *Benloe* 43 S. C.

These are cases of *next presentations* which were granted after the respective churches were fallen vacant: the following are grants of *advowsons* made after actual vacancy. (c)

Trin. 10 Eliz. Stephens v. Disley, et al', cited in *Anderson*, 15. *Stephens v. Wall*, *Disley*, et al'. *Benloe*, 192. S. C. and *Hil. 43 Eliz. Leak v. Bishop of Coventry and Dr. Babington*, *Cro. Eliz.* 811.

[1507] 2dly. The bishop had a right, upon the 20th of *June* 1760, to collate *by lapse*; the six months being expired before that time, and no presentation tendered to him: for, we say, the church became void by the INSTITUTION of *Griesley* to the living of *Seale*.

The words of the statute of 21 H. 8. c. 13. are these—section 9 enacts “That if any person or persons having one benefice with cure of soul, being of the yearly value of 8l. or above, *accept and take* any other with cure of soul, and be *instituted and inducted* in possession of the same, that then and immediately after *such possession* had thereof, the *first* benefice shall be adjudged in the law to be *void*; and (by section 10.) It shall be lawful to every patron having the advowson thereof, to present another; and the presentee to have the benefit of the same, in such like manner and form as though the incumbent had died or resigned; any licence, union, or other dispensation to the contrary thereof obtained, notwithstanding.”

(b) That is only in the argument of council.

(c) This is in effect so as to the three authorities next cited, and as to the last it seems to be strictly so.

Now though it be true, that the words of this act are "instituted *and inducted*;" yet it has been holden, "that INSTITUTION *only*, without induction, *vacates* the former benefice."

Digby's case, in *Hil. 41 Eliz. B. R. 4 Co. 79.* is a full and solemn determination in point, and agreed to by all the judges in *England*; and cites a like determination in *C. B.* "that he who is *only instituted*, is, within this act "of 21 *H. 8.* said to *have* a benefice with cure."

Robins v. Gerrard and *Prince*, in *Moore*, 434 to 448. *S. C.* agreed by all the judges of *England*; (p. 448.) *Robins v. Prince*, *Goldesbr.* 162. *S. C.*

Lord Ch. J. *Hobart* likewise, in the case of *Colt and Glover v. Bishop of Coventry and Litchfield*, p. 157, 158. lays it down, that a benefice is taken, received and had "by institution *only*," and says, "it was so judged in "*Digby's* case."

2 *Ro. Abr.* Title "*Presentment, Lapse*:" letter *A.* p. [9 *Ro. Abr.* 1 & 2. After lapse incurred to the ordinary, the patron 367. (A. 1, 2.) may present *before the church is full*; "but if the ordinary collates by lapse; and afterwards, *before induction*, the patron presents, the ordinary is not bound to receive." or 17 *Vin.* 388. (A.C.) 1, 2.]

In the case of *Shute v. Higden*, *Hil. 22, 23 C. 2.* Lord Ch. J. *Vaughan* says, that *by admission and institution* into the second benefice, the first is *ipso facto* so void that the patron may present another, if he will: and if the first living be of the value of *8l.* or above, the patron, at his peril, must present within six months, by 21 *H. 8.* though if it be *under* that value, no lapse shall incur, until deprivation of the first benefice, and notice, [1508]

But there is no need, in the present case, of either deprivation or notice to the patron: for, this former benefice being *above* that value, the cession of it does not depend either upon the common law or the ecclesiastical law, but upon the *act of parliament*: and therefore the patron must *take notice* of it at his peril. This appears clearly from *Dyer*, 237. a. pl. 29. *Goulbolt*, 23. case 33. 4 *Co.* 75, b. *Holland's* case. *Cro. Eliz.* 601. *Armiger v. Holland*, *S. C.* and *Watson's Complete Incumbent* 49.

Mr. Serjeant *Burland* argued this case on behalf of the defendant in error, (the plaintiff in the *quare impedit*.)

As to the *pleadings*—He said that the bishop's *rejoinder* was given up below; and is certainly bad, in that it *departs* from one matter to another, which other he might have originally resorted to: it does not fortify the matter of his former plea; but introduces *new* matter. And this is a *departure*; *Finch's Law* 57. a. And it puts in

1764.
BISHOP OF
LINCOLN
V.
WOLFOR-
STAN.

1764: issue a matter not asserted in our replication; viz.
BISHOP OF "that he did not refuse to admit *Hall*, before the time
LINCOLN "of his collating *Whitehead*."

†.
WOTFOR- If the replication is informal, the bishop cannot take
STAN. advantage of that informality upon our special demurrer to
his rejoinder: he can only take advantage of matter of
substance.

Now upon the substantial part of the case, it appears
that the plaintiff has a good title; and that no lapse had
incurred.

1st. It does not judicially appear upon the record,
that the grant to the plaintiff was subsequent even to the
institution.

The defendant cannot avail himself of his own
bad pleading, to find fault with the pleadings of his ad-
versary: he cannot connect them together: nor is the
particular day on which the grant is, under a *videlicet*,
mentioned to have been made to the plaintiff, either
material or issuable: and here it is only mentioned thus,
"viz. on the 9th of November 1759." It is no where al-
leged, "that Griesley was instituted to *Seale* before the
[1509] "advowson was granted to the plaintiff:" if it had, that
might have been traversed. But it is here set out, the plaintiff
might have given any particular day in evidence: this
9th of November is not material nor traversable.

Cro. Jac. 202. *Lane v. Alexander*. *Yelv.* 122. *S. C.*
Skinner, 660. *Rex v. Bishop of Chester* (in point) 2 *L. v.* 211,
Holbeck v. Bennett. 2 *Mod.* 184. *Stroud v. Bishop of*
Bath and Wells and Sir George Horner. 5 *Mod.* 267,
Blackwell v. Eales.

Therefore this priority of Griesley's institution to *Seale*,
to the plaintiff's grant is not admitted by the plaintiff.
Nor is any thing admitted by the demurrer; as the re-
joinder is confessedly *ritious*; and this appears by 2 *Ro.*
Rep. 22. *Holford and Platt's case*.

Neither indeed is it alledged, "that the institution
"was upon the 31st of October 1759:" nor "that the
"institution was prior to the grant." And this being an
unfavourable case, the court will not assist them to take
advantage of a forfeiture.

2dly. The lapse does not incur from the time of the
institution, but from the time of the induction: for it is
the induction into the second benefice that vacates the
first; and not the institution to it.

The doctrine of pluralities is laid down at large, in
Moore 434 to 448. *Robins v. Gerrard and Prince*; and in
Linwood's Provincials, 125, 127, 136.

The latter is in point "that the first church is not
"vacant till induction into the second." And in the
case of *Agar v. Bishop of Peterborough and Dean*, issue
was taken up on the induction to the second benefice:

whereby it seems to be allowed, (as it is observed in *Moore* 12,) "that admission and institution do not make "the first void, *without induction*." And in the argument of the case of *Robins v. Gerrard and Prince*, it is admitted "that the first benefice is not actually void till "induction." *Moore*, 442.

1764.
BISHOP OF
LINCOLN
V.
WOLF-
STAN.

Watson's Complete Intumbent, chapter 2. collects many cases to this effect. In the case of *Winchcombe v. Bishop of Winchester and Pulleston*, *Hobart* says "he is not within the statute of 21 H. 8. if he be not inducted." And *Cro. Car.* 354. *Rez v. Archbishop of Canterbury and Pryst*, goes upon the same principle.

The words of the statute of 21 H. 8. are taken from the Provincials: and the cases since the statute have been uniform, *as to LAPSE*.

BEFORE the statute, the patron had his election, [1510]
"whether he would present as upon a vacancy; or stay
"till after the deprivation and notice of it." But no lapse incurred by deprivation *without* notice: he was not bound to take notice at his peril till INDUCTION.

Godbolt, 23. 4 Co. 75. b. *Holland's case*. 4 Co. 79. b. *Digby's case*. *Moore*, 438, 542. *Cro. Eliz.* 601. 2 Ro. Abr. 361. Title "Presentment," letter L. pl. 6. and 2 Lutw. 1306, 1807: at large, in the case of *Shurpe v. French*.

Mr. *Blackstone*, in reply—As to the pleadings—He said he could by no means give up the bishop's rejoinder: which he denied to be a departure. It avers "that *Hall* "did not tender himself within the six months:" which averment, he said, was no departure from the plea, but a necessary support of it. And the traverse, "that he "did not refuse to admit *Hull*, before the time of his "collating his own clerk," is a right and proper traverse.

And he insisted that it appears sufficiently upon the pleadings, "that the institution of *Griesley* was upon the "31st of October; and that the grant of the plaintiff "was not made till the 9th of November following:" for the day under the *scilicet* is materially alleged; and is a positive and substantial averment of the particular day. And he offered to maintain, that the day "under "the *scilicet* is material, where the precise exact time is the "gist of the action."

As to lapse incurring from the time of the institution—He said he must leave that point upon the cases he had cited, and the general reasoning: which he would not press any further; having observed, by what had been dropped from the bench, during the argument, that the court was of opinion "that it was to be computed from "the time of induction only."

THE COURT were extremely clear, that, as to

1764. *lapse*, the avoidance of the former benefice does not take place till INDUCTION to the second; and Lord MASSFIELD and Mr. Justice WILMOT both said, that this was a point so *settled*, that it ought not now to be disputed.

BISHOP OF LINCOLN v. WOLYORSTAN.

[See 1 Com. Dig. 305. and qu. Cro. Eliz. 1811.]

* But it is good as to the advowson itself; (unless it be a corrupt purchase.)
H. 16 G. 3. Barret and Keyuel, Cl. v. Glubb (Clerk) and Rolle.

[1511] But they thought that the FACT *was not sufficiently ascertained upon these pleadings*: for though it appears clearly enough, "that the grant was made on the 9th of " November 1759," yet it does not appear "at what time " *Griesley was instituted* to the second benefice." Consequently, the objection can not be let in, "that it was " VACANT *when the grant was made*." It is no where averred "that the grant was *subsequent to the avoidance*:" nor is there any thing that *appears* upon the pleadings, sufficient to support the objection. Therefore they

AFFIRMED THE JUDGMENT,
unless cause.

Afterwards (on the last day but one of the term)

Mr. *Blackstone* attempted to shew cause: and hoped to satisfy the court, that he was not precluded from taking his objection to the grant: for he relied upon it, that "if " a proper time be alledged, *where* the precise exact " time is the *gist* of the action, the day under the *scilicet* " *is then material*."

But THE COURT were still of opinion "that he " could not get at his objection, upon *these pleadings*." For all the pleadings are *bad*, except the plaintiff's declaration; which is good. The whole stands, therefore, *upon the declaration only*: which states the conveyance of the right to the plaintiff to present, to be by a grant made on the 9th of November; and, upon the face of it, shews a *good title* in the plaintiff to present. The plea means indeed to put the matter upon the question "whether " the six months should be computed from the INSTI-

(d) *Contra Dy.* 26. pl. 165. *Per Fitzherbert and Shelley*, and that the grantee shall have the next avoidance, not that which was void before the grant. S. P. 1 *And.* 15. *acc. Benl.* 192. *Jenk.* 236. pl. 13.

And note, Lord Chief Justice *De Grey* took notice of the mistake already mentioned in this report, and was confirmed in his observations by Mr. J. *Blackstone* in *Barrett v. Glubb*, *Hil.* 16 G. 3. C. B.

"TUTION, or from the INDUCTION." But the plea, and likewise the rejoinder, are both out of the case; for they are both of them bad; and being bad, there is a total END of them, to every intent and purpose whatsoever. You cannot therefore extract from them a fact to destroy the plaintiff's title: for they are nullities, and just as much so, as if they had never been pleaded at all.

1764.
BISHOP OF
LINCOLN
v.
WOLF-
STAN.

Per Cur.

JUDGMENT AFFIRMED.

Mr. Serjeant *Burland* thereupon prayed costs and damages for the delay, upon 3 H. 7. c. 10. citing *Dyer* 1034.] 77. a. pl. 34. *Cro. Eliz.* 617. *Graves v. Short.*

But he withdrew this motion; thinking it more advisable to drop it, as he could only have a rule to shew cause next term.

[1512]

N. B.—It was observed by Mr. Justice *Wilmot*, upon the first argument, "that though the patron has six months from the induction, to present; (so that no lapse shall incur within that space of time;) yet he may, if he pleases, present before the induction."

Note also, that Lord *MANSFIELD* and Mr. Justice *WILMOT* both said, that the true reason why a grant of a fallen presentation, or of an advowson, after avoidance, is not good, quoad the fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its being then become a chose in action.

N. B. A writ of error returnable in parliament was brought upon this judgment. * (e)

* Qu. what became of this and I do not

writ of error? I believe nothing: for I never heard any more of it, find it amongst my Parliament Cases.

REED versus COLE.

Tuesday, 3d
July, 1764.

THIS was an action on the case, upon articles of agreement constituting a society for the mutual assurance

On mutual insurances, all the parties are to be contributory.

(e) There are several cases where it hath been holden that a presentation to a church when void, cannot be granted for the void turn, though the grant were voluntary; and the old law was, that a right of action could not be granted: and there is no exception of modern times in this, though perhaps there are some in other cases; but even then, the action must be in the name of the assignor, except in particular cases, such as where it may by stat. be brought in the names of the assignees of a bankrupt, the assignees of bail-bonds, and some few other cases, and perhaps by the *Lex Mercatoria* in some others, but in none by the common law.

1764.
NEED
V.
COLE.

of each others ships: whereby they engaged that when and so often as any of the ships wherein any of the members of this society had property, should be lost, the rest should contribute to such loss. But every member was obliged to prove a property of 500*l.* in a ship: and if he would cease to be a member, he was obliged to give *six months' notice*. The plaintiff shewed that he had the requisite property in a ship, and became a member; and that the ship was lost. Plea—that the plaintiff had *parted with* his interest in the ship before the loss happened. Replication—That by articles of agreement with the purchaser of the ship, the plaintiff had agreed to pay 500*l.* *if a loss happened within three months*: and therefore he was *interested during the voyage*. Demurrer to this replication and joinder in demurrer.

[See Doug.
370. 1 Ver.
460]

Mr. Wallace, for the defendant, argued that the stipulation between the plaintiff and the defendant was at an end, as soon as the plaintiff had *disposed of his property in the ship*: and his private agreement with the purchaser of it, without the consent of the society, is no more than his own *private and personal* insurance made to the purchaser.

[1513]

Mr. Ashhurst, *contra*, for the plaintiff, argued, that he ought to recover; both upon the words of the agreement, and within the equity of it: for he had *not ceased* to be a member of the society, nor could cease to be so, without giving *six months' notice*. Therefore he *remained bound to contribute* to the losses of the rest: and *consequently*, the rest were bound to contribute to *his*. And he stood as a trustee for the person to whom he had sold his interest in the ship: it was not necessary that he should continue to hold it in his own right. He *remained contributory* to the losses of the other members, as he had not given six months notice of his ceasing to be one.

Mr. Wallace, in reply, urged, that as the property was out of the plaintiff at the time when the loss happened, he could take no benefit of the articles of mutual insurance amongst the members of this society. For, the parting with his property in the ship was his *own act*: and if he remained contributory to the losses of the other members, that arose from his own *neglect* in not giving the six months notice, as the articles required him to have done.

• Mr. J. Denison was absent.

BUT THE * COURT were of opinion, that as he continued *contributory* to the losses of the others, at the very time when this loss happened, it was but just and equitable, and within the words and meaning of the agreement, that *they* should contribute to *his*. He still had an interest in the safety of the ship: he had not parted with

all his interest in it; but continued interested *quoad* this loss. 1764.

Per Cur'.

JUDGMENT for the PLAINTIFF.

REX *versus* LE CHEVALIER D'EON.

Wednes. 4th
July, 1764.

MONSIEUR D'EON, who came over hither in the quality of secretary to *M. le Duc de Nivernois* the late *French* ambassador, and after the duke's departure, remained here charged with the affairs of *France*, was afterwards (upon a particular occasion) invested with the character of minister plenipotentiary. Upon the arrival here, of the present *French* ambassador, the Count de *Guerchy*, *M. D'Eon* set up a press in his own house, and in his book there printed under his own inspection, *libelled* the Count de *Guerchy*. Upon this, an information was filed against him by Mr. Attorney General, not only for printing and publishing this libel, but as an infractor of the law of nations: and notice of trial was given. Whereupon *M. D'Eon* (by his counsel) moved to put off the trial, on account of the absence of several material witnesses, whom he specified in his affidavit: and his affidavit contained the usual assertions requisite for putting off a trial, and particularly "that they were material witnesses for him; that he could not safely go to trial without their evidence; and that he had hopes and expectation of procuring their presence by next Michaelmas term."

[S. C. 1 Bl.
510.]

Absence of witnesses a road and not likely to return, no cause for putting off a trial.

[1514]

Upon shewing cause against putting off the trial, it appeared that the libel was not printed or published till *March* or *April*; and that these witnesses went away from *England* to *France*, in the preceding *November* or *December*. It appeared also, that they were natives of, and resident in *France*; that they were in the service of that crown; and that there was no probability of their being sent over, or even permitted to come over, to give evidence on behalf of *M. D'Eon*, (who stood, at this time, in no favourable light at his own court, but very much otherwise.)

After a full hearing of counsel on both sides (*M. D'Eon* being present,)

THE COURT were unanimous that there appeared no sufficient reason for putting off the trial.

* Mr. Justice Denison was absent.

They granted that in all cases, whether criminal or civil, and whether the nature of the proceeding be instantaneous or otherwise, a trial shall not be so hurried on, as to do injustice to the defendant; an affidavit in common form may be sufficient where no cause of suspicion appears: but men take such latitude to swear in the

1764.

REX

v.

D'EON.

common form, that where a suspicion arises from the nature of the question or from contrary affidavits, the court will examine into the *ground* upon which the delay is asked; and have, in *criminal* as well as civil cases, refused to put off a trial, notwithstanding an affidavit in common form.

It is necessary therefore in such a case as this, (1st.) to satisfy the court that the persons are *material* witnesses; 2dly, to shew that the party applying has been guilty of *no laches* nor neglect, in omitting to apply to them and endeavour to procure their attendance; and 3dly, to satisfy the court that there is a *reasonable expectation* of his being able to procure their attendance at the future time to which he prays the trial to be put off.

[1515]

But in the present case, all these reasons fail.

These witnesses are *sworn* to be material, as the defendant apprehends and believes. But on the contrary, it appears (negatively) that they *can not* be material: for, as they were gone out of *England* some months before the printing or publication of this book; they could not be conversant of the facts of the offence laid in this information. If their knowledge relates to any circumstances that may serve to mitigate the punishment in case he should be convicted, *that* sort of evidence will not come too late after conviction of the offence, and may be laid before the court by affidavits.

But if it should appear upon the case proved at the trial, "that the defendant was prejudiced by refusing "this delay," the court could set it right by granting a new trial: which had often been *said* upon like occasions; but *no* case had yet happened, where any prejudice appeared to have been done by the court's refusing, upon particular circumstances, to put off a trial notwithstanding the *formal* affidavit.

As to their being *sent* out of the kingdom by the Count *de Guerchy* himself, on purpose to prevent their giving testimony in the cause, (which has been alledged;) there neither is any proof of it, nor is it possible that it could be so: they were actually gone, *before* the fact which is the subject of the charge was committed. It is impossible that they could be sent abroad by *M. de Guerchy*, to prevent their giving evidence in *this* cause, the foundation of which *did not exist* at the time when they went. If they *had* been material witnesses for the defendant in this cause, and *had* been sent away by the person on whose account the prosecution is carried on, *that* indeed would have been a sufficient ground for putting off the trial till they could be had. But here is no pretence for such an insinuation.

Neither does it appear, that there has been the least

endeavour used by this gentleman or any on his behalf, to get them over.

1764.

REX
V.
D'EON.

And as to any expectation of their returning to England by the next Michaelmas-term or at any future time, there does not seem to be any probability of it; nor does the defendant lay before the court any grounds of such an expectation. On the contrary, the reverse is highly probable; the presumption seems strong, that they will not come. They cannot be compelled to come: and it does not seem likely that they will be ordered to come, for this purpose. These are foreigners, natives of and resident in France, and in the actual service of that king: which renders this case quite different from the ordinary cases of English witnesses being accidentally gone abroad, or gone for a small time only, and expected to return to their own country, their natural home and residence.

[1516]

Upon the whole, they were clearly of opinion "that the putting off the trial could not tend to advance justice, but on the contrary would delay it;" and therefore discharged the rule for shewing cause why it should not be put off.

RULE DISCHARGED.

M. D'Eon was soon after tried and convicted, upon so clear evidence, that he made no defence: and from the proof against him by witnesses and writings under his hand, it was impossible for him to make any defence. Yet he seems to have sheltered himself under some salvo, in swearing the persons in France to be "material witnesses."

GRANT versus VAUGHAN.

Wednes. 4th
and Thurs 5th
July 1764.

UPON shewing cause why a verdict which had been given for the defendant should not be set aside (upon payment of costs,) and a new trial granted—The case appeared to be this—

[S. C. 1 Black.
495.]

The defendant Vaughan, a merchant in London, gave a cash-note upon his banker, to one BICKNELL a husband of a ship of his: which note was dated "London, 22d October 1763," and directed to Sir Charles Asgill, who was Vaughan's banker; and was worded thus—"Pay to SHIP FORTUNE, or BEARER," so much. Bicknell, by some accident, lost this note. The person who found it, or who at least was in possession of it (how ever he might obtain that possession,) came, four days after the note was payable in London, to the shop of GRANT the plaintiff, who was a tradesman at Portsmouth, and bought five pounds worth of tea of him and gave him this note in payment, desiring to have the change out of it. GRANT (the plaintiff) stept out, to

B-arer of a bill of exchange, may maintain an action against the drawer.

[See B. II. 479.
3 Durn 177.
4 Durn. 155.
1 H. Bl. 317.
4 Bosanq 619.
3 Bosanq 561.]

1764.

GRANT

V.

VAUGHAN.

make inquiry "who this *Vaughan* might be:" and upon being informed "that he was a very good man and that "it was his hand-writing," he readily gave the change out of the note, retaining the price of the tea. *Vaughan*, upon being apprized* that *Bicknell* had lost the note, sent notice to Sir *Charles Asgill*, "not to pay it." Whereupon *GRANT*, being refused payment, brought his action upon the case against *VAUGHAN*, and inserted *two counts* in his declaration; one, upon an *inland bill of exchange*; the other, an *indebitatus assumpsit* for money had and received to his use. The cause was tried by a special jury of merchants; who found for the defendant.

Sir *Fletcher Norton* and Mr. *Dunning* argued on the part of the plaintiff; and Mr. *Morton*, Mr. *Eyre* (recorder of *London*;) and Mr. *Wallace*, on the defendant's part.

On the part of the defendant it was insisted—

That an action could not be maintained on *either* of these two counts.

That this is *not a negotiable note*; but only an *authority to receive* so much cash.

That *GRANT* did *not* take it upon the *credit of the DRAWER*; but upon the *credit of the person who GAVE it him in payment*.

That such a draught as this cannot be considered as a *negotiable bill of exchange*: for it was *not accepted*, nor *indorsed*: nor was it *protestable*, nor intitled to any day of *grace*. It is only a mere contrivance or convenience between the banker and the person who keeps cash with him. And Mr. *Wallace* not only insisted that these cash-notes are never intended to be generally negotiable; but even supposed them to be confined within the extent of the bills of morality, at furthest. A bill of exchange to *A. or bearer*, is a bill of exchange to *A. himself*: but is not negotiable. And there is * no instance (as the re-

* See vide
2 Shower, 235.
Hinton's case,
34 C. 2. B. R.

corder said) of any custom of merchants, "for a bill of exchange being made payable to *bearer*," generally.

In 3 *Lev.* 299. *Horton v. Coggs*, in C. B. P. 3 *W. & M.* on an action brought by the bearer of a goldsmith's note payable to *B. or bearer*, the custom "to pay to the "bearer" was holden *too general*.

In 1 *Salk.* 125. *Hodges v. Steward*, P. 5 *W. & M. B. R.*—The first point resolved is, "that a bill of exchange payable to *J. S. or bearer*, is not assignable by the "contract; so as to enable the indorsee to bring an action, if the drawer refuse to pay."

[1518] The *preamble* to 3, 4 *Ann. c. 9* does not say one word about notes payable to *bearer*. It begins thus—"Where-
"as it has been held, that notes in writing whereby the
"party promises to pay unto any other person, or his

"order, are not assignable, &c." And though the words, "or unto bearer" are slipped into the *enacting* part of the first clause, yet no part of the whole statute bears any relation to them.

1764.

GRANT
v.

VAUGHAN.

In the case of *Morris v. Lee*, Tr. 11 G. 1. B. R. (which was an action brought by the indorsee of a note "to be accountable to A. or order, for 100 l.") the court observed that the words *or order* was the proper expression used in such notes, and mentioned in the act of parliament, *where it intended the note should be indorsable or negotiable*.

Arguments therefore arising from cases upon notes of hand will not prove much in the present case.

And upon the *second count*, the plaintiff can have no pretence, they said, to recover against Mr. VAUGHAN; he can only resort to the person from whom he received or purchased the note. This note is not like a banker's note payable to bearer. However, even upon one of *them*, the bearer can not recover *as bearer*: for which, they cited the case of *Walmesley v. Child*. * V. post.

1524.

[And 1 Burr
459.]

If a bill is payable "to bearer" only, the *original advancer* of the money may indeed maintain an action against the drawer upon an *indebitatus assumpsit*, for money had and received to his use: but no other person can do so, though he comes by it fairly and upon a valuable consideration. And for this they cited the abovementioned case of *Hodges v. Steward*, in 1 Salk. 125.

THE PLAINTIFF'S counsel insisted that this bill or note was in its nature *negotiable*; and that such bills were in fact always considered as *negotiable* and *actually negotiated*, and commonly circulated *as cash*. And if they be, from the *nature* of the contract, *negotiable*, the finding of the jury can not alter the *law*: it is not the province of the *jury*, but of the *court*, to determine what is or is not an inland bill of exchange or a promissory note, *within the statute*. If the jury founded their verdict on *law*, they have mistaken the law: if on *fact*, it is directly *contrary* to the notoriety of the fact; and bank-notes alone are a full and sufficient proof of that. And it is not to be conceived, that they are negotiable *within* the bills of mortality, and not negotiable beyond or *out* of them: if they are negotiable *any* where, they must be so *every* where.

They object, "that it is not a bill of exchange, because [1519]
"it is not *accepted*, nor can be *protested*, nor is intitled
"to a *day of grace*, nor is *indorsable*."

But it is a *negotiable instrument*; it is not necessary that it should be a *bill of exchange*. An inland bill of exchange is not like a foreign bill of exchange: for the former could not have been *protested*, before this act of

1764.

GRANT

v.

VAUGHAN.

parliament, nor needs to be so, since the act; whereas a foreign one always absolutely required it. This is just the same as a bill payable to bearer. The name of the person to whom such a bill is made payable, means nothing at all, in general cases of being made payable "to such a one or bearer:" much less can it mean any thing in this particular case, where no name of a person precedes, but the payment is to be "to ship Fortune, or bearer."

Then it is extremely clear (and indeed admitted) that the plaintiff came by it fairly and honestly and *bona fide*; and upon a *valuable consideration*, and *without notice* of its being a lost bill. He therefore stands in the place of BICKNELL, and is equally intitled to maintain his action, as Bicknell himself would have been if he had never lost it nor parted with it: and he is intitled to recover upon either of the two counts laid in the declaration. It is equal to him indeed, which of them he recovers upon: and there can be no doubt as to the latter. And as to the former, the court will not readily listen to objections about forms, when the true merits and honest title are clear and plain.

The only true and fair question is, "whether BICKNELL or GRANT ought to bear this loss."

And surely there can be no doubt, as between the man who lost the note (be it accidentally or carelessly,) and a fair purchaser of it for a valuable consideration.

This case was determined in the case of *Miller v. Race*, H. 31 G. 2. B. R. * That resolution was founded upon the fair purchaser's having a better right than the loser of a bank-note: even though the man was, in that case, robbed of it.

Whoever gives a note payable to bearer, expressly promises to pay it to every fair bearer. However, an implied promise would suffice for our purpose.

This point is clearly settled by the act of 3 & 4 Anne, c. 9, which puts notes of hand upon the same foot with both sorts of bills of exchange, and makes them assignable (though choses in action.) It enacts, that all notes in writing, promising to pay to any person or order, or unto bearer, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons to whom the same is made payable: and that the assignee may bring his action in like manner as in case of inland bills of exchange.

It is objected that the words "or to bearer" were not intended to have any operation; because no notice is taken in the preamble of the statute, of notes made payable to bearer, but only of notes which are made payable to a person or his order.

* Vide ante, p. 452.

But ~~how~~ could any notice be taken of the former, in the preamble? Such notes did not require *indorsement*: and the preamble only recites, "that the latter had been holden not to be *assignable or indorsable over*, within the custom of merchants; and that the assignee or indorsee could not, within the custom of merchants, maintain an action upon them against the drawer." But they were *negotiable*, before the act was made; and an action would so far have lain upon them, that they were *evidence of a debt*, and would put it upon the defendant to shew that the debt was satisfied. The person to whom such a note was given, might have declared in a *general indebitatus assumpsit for money lent*, and the note would have been good evidence of it: though he could not have declared upon the custom of merchants. This was settled in the case of *Clerke v. Martin*, P. 1 Ann. B. R. reported in 2 Ld. Raym. 757. and 1 Salk. 199. And Lord Ch. J. Holt was peevish there, and said "that the continuing to declare upon these notes, upon the custom of merchants, proceeding from obstinacy and opinionativeness; since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit for money lent*."

That action was brought upon a note payable to the plaintiff *Clerke* or his order, and brought by *Clerke* himself. But actions had been sometimes brought by the bearer, before the making of the statute of 3 & 4 Ann. upon bills or notes payable to bearer only; particularly, in the case of *Nicholson v. Sedgwick*, P. 9 W. 3. in C. B. mentioned in 3 Salk. 69. but best reported in 1 Ld. Raym. 180.

Hinton's case, in 2 Shower 235, M. 34 C. 2. B. R. (though loosely reported) is on the plaintiff's side as far as it goes. It is plain that the plaintiff *Hinton* brought the action as bearer: and the case fully proves "that the action would lie, if the plaintiff came by the bill of exchange honestly and on a valuable consideration;" this being Lord Chief Justice *Pemberton's* general allegation.

As to the case of *Horton v. Coggs*, reported in 3 Lev. 299—The reason given why the custom "to pay to the bearer" is too general, (viz. "that perhaps the goldsmith, before notice by the bearer, had paid it to *Barlow* himself,") is a bad one.

The case of *Nicholson v. Sedgwick* (or *Seldnith*, as it is called in 3 Salkeld) was exactly like the case of *Horton and Coggs*: and the court agreed, "that the action could not be brought in the name of the bearer; but ought to be brought in the name of him to whom the note

1764.
GRANT
V.
VAUGHAN.

[1521]

1764.
GRANT
v.
VAUGHAN.

"was made payable." But the *reason* there given is not a sufficient one; it is this, "that if the bearer should be allowed to bring the action in his *own* name it might be inconvenient; for then any one who *finds the note by accident*, may bring the action and recover." Whereas it appears by *Hinton's* case, "that he *must intitle himself to it on a valuable consideration*: for if he come to be bearer by *casualty* or *knavery*, he shall *not* have the benefit of it." Neither does that reason (if it had been a better one than it is) clash with the present case; because *this* plaintiff did here pay a valuable consideration for the note.

And to urge the *necessity* of the action's being brought in the name of the person to whom the note was originally made payable would carry the matter *too far*: for that would prove that BICKNELL *himself* could not have maintained the action; since the note is not made payable to *him*, but to *ship Fortune*. Yet without doubt, BICKNELL *himself* might have maintained the action. And this appears by a remark of Lord *Raymond's*, in reporting the case of *Tassel and Lee v. Lewis* (1 Lord *Raym.* 741.) "that if the party to whom the note is delivered, demands the money of the goldsmith in reasonable time, and he will not pay it; it will charge him who gave the note: *Hopkins v. Geury*, II. 1 *Ann. B. R. Guildhall*."

It would be absurd indeed to say, "that the bearer could maintain an action upon the note that he came *dishonestly* by." Certainly, he can not: for he must prove, "that he came by it *honestly*."

* Vide ante,
1518.

As to the inference drawn * from the case of *Morris v. Lee*, that these notes made "payable to bearer" were *not* "intended to be negotiable;" it is impossible to suppose such a thing: the *contrary* is most clear and apparent. This was one of the matters which the act of 3 & 4 *Ann.* intended to remedy. The cases relied on by the defendant were prior to that act: there is none, *since* the making of it, that can avail them. And there is no case at all, where it has been determined, that a note of this kind could be *given in evidence* upon a general *indebitatus assumpsit* for money *had and received*.

[1522]

It is enough for the plaintiff that this note was *negotiable*. The bearer must prevail against the drawer in some mode of action; having come by it fairly and honestly. Since the act the *fair* holder of a note payable to bearer may, by the *express words* of the act, *maintain an action against the drawer*: otherwise, the act would not put promissory notes upon the *same foot* with *inland bills of exchange*, as it professes to do. The words of it are "shall and may maintain an action

"for the same, in such manner as he might do upon any inland bill of exchange." And the interests of commerce require this determination. But there can be no sort of doubt on the *latter count*; as the note is evidence of the plaintiff's money being in the hands of the person who gave it.

1764.
GRANT
v.
VAUGHAN.

Whether therefore this case be considered upon principles of law, prior to the act of 3 & 4 Ann. or upon that act, or upon what is passed since the act, it will appear that the plaintiff ought to recover in this action; and consequently, the present verdict is a *wrong one*, and ought to be *set aside*.

And no inconvenience can happen, nor will any injustice be done thereby: for the matter will be open to evidence, and all facts may appear.

LORD MANSFIELD said the case of *Nicholson and Sedgwick* was urged by the defendant's counsel at the trial: and, not being apprized of the point in question, till it came on to be tried before him, he was not fully aware of the cases which differed from it. And yet he was struck, he said, very strongly that, upon general principles that case was not agreeable to law and justice: and he then thought that the reasons, upon which that case and the other authorities relied upon by the counsel for the defendant at the trial, were grounded, were insufficient ones.

THAT "of the goldsmith's having perhaps paid the money to the original payee himself, before notice from the bearer," can never hold: it *cannot happen*, in the course of business, that the money should be paid to the nominee, before notice from the bearer.

Nor was any satisfactory reason given, why an action might not be brought in the bearer's own name. The reason alledged, "that then any person who finds the note accidentally, may bring an action and recover," is insufficient; because the plaintiff in such action must prove that he came by it *bonâ fide* and upon a valuable consideration. [1523]

As to the necessity of bringing the action in the name of the person to whom the note was originally made payable;—It was impossible in the present case; because there was no person originally named as the payee: it runs "pay to ship Fortune, or bearer." However if there had been a person named, the reason would not hold: or the person so originally named may become bankrupt; or may be indebted to the drawer of the note, so as to give the drawer a right to set off such debt against the demand of the money due upon the note. So that if the courts of law should not allow the bearer to bring the action in his own name, there might be no relief at all.

1764.
GRANT
v.
VAUGHAN.

And it can never be supposed reasonable or legal, that the banker should have it left in *his* discretion or choice, to pay the money to one or the other as his fancy or inclination should lead him.

These thoughts occurred to me at the trial: and therefore I chose to take the opinion of the court.

I left two things to the consideration of the jury. The first was, "whether the plaintiff came to the possession of this note *fairly and bonâ fide*:" (which necessarily includes his not having notice of its being a lost note.) The second was, "whether such draughts as this is, were, in the course of trade, dealing and business, *actually* paid away and negotiated, or *in fact and practice negotiable*:" and I then considered *this*, as leaving a *plain fact* to them, upon which they could have no doubt.

[1 Bosanq.
565.]

But I am now clearly of opinion, that I *ought not* to have left the *latter* point to them: for it is a question of *law*, "whether a bill or note be *negotiable*, or *not*."

It appears in the books, "that these notes *are, by law, NEGOTIABLE*." And the plaintiff's maintaining his action, or not maintaining it, depends upon the question "whether such a note is *negotiable*, or *not*."

It appears likewise, "that the *bearer* of them may maintain an action *as BEARER*, where he can intitle himself to them on a *valuable consideration*."

[1524]

Hinton's case, in 2 Shower 235, is this—"Case on a bill of exchange, against the drawer, (bill not being paid,) and payable to J. S. or to the bearer. The plaintiff brings the action, *as bearer*. And, upon evidence, ruled by the Lord Pemberton, that he *must intitle himself to it on a valuable consideration, (though among bankers they never make indorsements in such case):* for if he come to be bearer by *casualty* or *knavery*, he shall *not* have the benefit of it." (And it would be absurd, to *indorse* such bills as are made payable to *bearer*.)

[1 Bosanq.
550.]

Crawley v. Crowther, 2 Freeman 257. Tr. 1702. in Chancery—"If a bill be payable to *A.* or bearer, it is like so much money paid to whomsoever the note is given; that, let what accounts or conditions soever be between the party who gives the note and *A.* to whom it is given, yet it shall *never affect the bearer*; but he shall have his whole money." So that the *whole interest* is transferred to the *bearer*.

1 Sulk. 126. pl. 5. Anonymous, M. 10 W. 3. coram Holt Ch. J. at nisi prius at Guildhall. "A bank-bill payable to *A.* or bearer, being given to *A.* and lost, was found by a stranger, who transferred it to *C.* for a *valuable consideration*: *C.* got a new bill in his own

"name. *Per Holt Ch. J.* *A.* may have trover against the stranger who found the bill; for, he had no title, (though the payment to him would have indemnified the bank :) but *A.* can not maintain trover against *C.* by reason of the course of trade; which creates a *privity in the assignee or bearer.* It is negotiable by delivery. 1764. GRANT V. VAUGHAN.

*Miller v. Race, H. 31 G. 2. B. R. ** The holder of a bank-note recovered against the cashier of the bank, though the mail had been robbed of it, and payment was stopt; it appearing, that he came by it fairly and *bond fide* and upon a valuable consideration. And there is no distinction between a bank-note and such a note as this is. *Vide ante, p. 452.*

The act of 3, 4 Ann, c. 9. puts *promissory notes* upon the same foot, throughout, with *inland bills of exchange*. And therefore whatever is the rule as to inland bills of exchange payable to bearer, must be so likewise as to notes payable to bearer. [4 Durn. 149.]

In a case between *Walmesley v. Child*, 11th December 1740, [S. C. 1 Vez. in Chancery, where one of Mr. Child's notes, payable to 341. bearer, was lost or stolen, and payment stopt by the true owner, who demanded that it should be paid to him; Mr. Child refused to pay it without surety against the demands of a future bearer. The true owner brought his bill. Lord Hardwicke dismissed the bill, unless the true owner would find such security. And he went upon the principle, that no dispute ought to be made with the bearer of a cash-note, who comes fairly by it; for the sake of commerce, to which the discrediting such notes might be very detrimental. 1 Burr. 459.] [1525]

Upon looking into the reports of the cases on this head, in the times of King William the third and Queen Anne, it is difficult to discover by them, when the question arises upon a bill and when upon a note: for the reporters do not express themselves, with sufficient precision, but use the words "note" and "bill" promiscuously. It appears, however, that there were different opinions about the manner of declaring upon them: Lord Ch. J. Holt got into a dispute with the city about it. He was of opinion, that the plaintiff could not declare *as upon a specialty*, (where the consideration could not be disputed :) but he all along agreed, that the plaintiff *might declare upon an indebitatus assumpsit*. The objection was, to bringing an action upon the note itself, as upon a specialty; but I do not find it any where disputed, that an action upon an *indebitatus assumpsit* generally, for money lent, might be brought on a note payable to one or order. See 2 Ld. Raym. 758.

Great force arises from the act of parliament of 3 & 4 Ann. putting notes merely upon the foot of in-

1764.

GRANT

v.

VAUGHAN.

[3 Durn. 179]

land bills of exchange, and particularly *specifying* notes payable *to bearer*.

But upon the *second* count, the present case is *quite clear*, beyond all dispute. For, undoubtedly, an action for money had and received to the plaintiff's use, may be brought by the *bond fide bearer* of a note made payable *to bearer*. There is *no* case to the contrary. It was certainly money received for the use of the original advancer of it: and if so, it is for the use of the person who *has* the note *as bearer*. In *this* case, BICKNELL *himself* might undoubtedly have brought this action. He *lost* it: and it came *bond fide* and in the *course of trade*, into the hands of the present plaintiff, who paid a *full and fair consideration* for it. BICKNELL and the PLAINTIFF are *both innocent*. The law must determine *whether* of them is to stand to the loss, and by law, it falls upon BICKNELL.

There ought to be a *new trial*.

Mr. Justice WILMOT—If a verdict be given *without* evidence at all, or *against plain evidence*, or *against law*, it ought not to stand.

[1596]

The two matters left to the consideration of the jury, upon this trial, were "whether the plaintiff came by *this* note *fairly* and *bond fide*;" and whether such "notes or bills as *this* is, are in *fact and practice* *negotiated*."

The *latter* is as plain and notorious, as that there is a bank of *England*: no man can doubt it. The verdict is therefore *against evidence*, as to *this* point.

Probably, the jury took upon themselves to consider "whether such bills or notes as *this* is, were in *their own nature negotiable*." But *this* is a point of *law*: and by law, they *are* negotiable. Their verdict is therefore *against law*; and ought to be set aside. For, though when facts and law happened to be so complicated and intermixed that a jury can not help taking *both* into their consideration, it may be difficult or even impossible for them to avoid founding their verdict *upon both*; yet they are not at liberty to determine *contrary* to law: they ought to take their notion of law, from the direction of the judge who tries the cause. *Formerly*, a jury would have been liable to an *attaint*, for such a verdict: *now*, the court control their verdicts, by setting them aside and granting a *new trial*.

As to the *other* matter, the manner how this plaintiff came by the note—It appears to have been taken by him *fairly* and *bond fide*, in the *course of trade*, and even with the greatest *caution*; he made inquiry about it, and then gave the change for it. And there is not the least

imputation or pretence of suspicion that he had any notice of its being a lost note.

1764.

So that this verdict is clearly *against law*: for if the note be *negotiable*, and the plaintiff came *fairly* by it, he was intitled to *recover*.

GRANT
v.
VAUGHAN.

THOUGH both the claimants were innocent; yet, as BICKNELL *lost* the note, and GRANT took it in the *course of trade, bonâ fide* and upon a *valuable consideration*, GRANT has the *better equity*. But if their equity were only *equal*, it is a known and a good rule, that "*melior est conditio possidentis*;" and *that* would be sufficient to turn the scale. If there was *negligence* on one side, and *none* on the other; *that* also would turn the scale: and if there be any on *either* side in this case, it should seem to be rather imputable to the person who *lost* it, than to him who thus took it in the course of trade.

If *this* bearer can not bring an action upon it, *no-body* [1527] can: for as it is *not* made payable to any particular person *by name*, no action can be brought in the name of such particular person.

But this is a *negotiable* note; and the action may be brought in the name of the *bearer*. "*Bearer*" is *descriptio personæ*: and a person may take by *that* description, as well as by any other. In the nature of the contract, there is no impropriety in his doing so. It is a contract "*to pay the bearer, or to the person to whom he shall deliver it*," (whether it be a note, or a bill of exchange:) and it is *repugnant* to the contract, that the drawer should object "that the bearer has no right to demand payment from him."

Then upon the cases—*Hinton's case* in 2 *Show.* 235. is *decisive*: and it is agreeable to common sense and reason, "that if a man comes by such a note or bill, *fairly* and "on a *valuable consideration*, he should have a right to "maintain an action upon it *as bearer*."

The *reasons* given in the cases that are *opposite* to this, are altogether unsatisfactory. Those determinations strike at this great branch of commerce: if they were to prevail, they would put an end to all this species of it. *Who* would take a bill or note payable to one or bearer, if the person *named* in it might *release* it, or if a debt of his might be *set off* against it?

On the other hand, it is but just and reasonable, that if the bearer brings the action, he ought to intitle himself to it on a *valuable consideration*; and strictly to prove his coming by it *bonâ fide*.

EVEN before the statute of 3 & 4 *Ann.* Lord Ch. J. *Holt* himself thought, that an *indebitatus assumpsit* for money *lent*, or for money *had and received*, might be maintained upon such a note: and if it was a question *antecedent* to

1764. that act, I should stand by that first case of *Hinton*, rather
GRANT than the latter ones which differ from it.

v. But that statute was made expressly and on purpose to
VAUGHAN. obviate these doubts.

However, if you would suppose it made to introduce a
new law, and that such an action could *not* have been
maintained before the making of it; yet it is the manifest
and professed intent of the act, to put promissory notes
1528] upon the *same foot* with inland bills of exchange; and it
clearly means to make notes payable to bearer, liable to ac-
tions brought upon such notes as upon a specialty.

And no case having happened upon this head since
Durn. 149.] the making of the statute, is a circumstance which shews
that the statute was so understood, and that the true and
sound construction of it is "that promissory notes *should*
"be put upon the *same foot* with inland bills of exchange."
If it should be construed otherwise, it would follow,
"that inland bills of exchange would be upon a *better foot*
"than promissory notes," which would be contrary to the
words and meaning of the statute.

THIS, now under consideration, is a negotiable instru-
ment, which, I think, participates *more* of the nature of a
promissory note, than of a bill of exchange. But taking it
as a bill of exchange,—a bill of exchange is a promise "to
"pay the money, if the drawee does not pay it;" con-
sequently, the payee may bring the action against the
drawer.

In this particular case, if the *bearer* can not bring the
action, *who* can? No person at all is named: it is "pay to
"ship *Fortune*, or bearer." Therefore this particular case
is out of all the cases cited. For, they say "that the action
"must be brought in the name of the person to whom the
"note is made payable:" but there is no such person in
the present case.

It would be of infinite inconvenience, and would intro-
duce the utmost confusion, if it were to be established
"that the bearer of a bill or note made payable to bearer
"could not maintain his action upon it."

As to its being negotiable *within* the bills of mortality
and *no further*; there is no colour for such a distinction:
it must be negotiable *every* where, if it is negotiable
at all.

Upon the whole, I think this to be a verdict against
law; and am of opinion that it ought to be set aside.

Mr. Justice YATES delivered his opinion much
to the same effect; and clearly held the verdict to be
against law.

It was not within the province of the jury, to determine
upon the negotiability of this note: it was a question of

~~fact~~; not of fact, "whether such a bill or note was or 1764.
"was not negotiable."

And nothing can be more peculiarly negotiable than a draught or bill payable to *bearer*; which is, in its nature, payable from hand to hand, *toties quoties*. GRANT
v.
VAUGHAN.

And he was of opinion, that an action *will lie* for the ~~bearer~~ of such a bill.

The reasons given against it, in the cases which have been cited by the defendant's counsel, are not at all satisfactory.

It had been doubted, it is true, "whether that *species* of action where the plaintiff declares *upon the note itself* as upon a *specialty*, was proper:" but here is a count upon a *general indebitatus assumpsit for money had and received for the plaintiff's use*. The question "whether he can maintain *this* action," depends upon its being *assignable*, or not. The *original advancer* of the money manifestly appears to have had the money in the hands of the drawer: and therefore *he* was certainly intitled to bring *this* action. And if he *transfers* his property to another person, that other person may also maintain the like action. *Whoever* has money in the hands of another may bring such an action against him. This appears from the determination of the case of *Ward v. Evans*, reported in 2 Ld. Raym. 930. Where not a shilling of money had passed between the plaintiff and defendant; and yet *Holt* and *Powell* both held, "that an *indebitatus assumpsit* for monies received to the plaintiff's use, properly lay." In the present case, the drawer had money in his hands belonging to *BICKNELL*; and *BICKNELL* must be considered as having delivered this instrument to the plaintiff GRANT; which is tantamount to an indorsement. (A real indorsement of a note payable to bearer would have been absurd.) The *delivery* of it must indeed be proved, and the *circumstances* of the present case do amount to a *proof* of a delivery of it to the plaintiff. And there is no doubt about his having come by it *fairly, bonâ fide*, and on a *valuable consideration*.

There would be great inconveniences, if such an action as this is, might not be brought by the *bearer*. If no action could be brought but in the name of the person to whom the bill or note was *originally* made payable, that person might *release* the action; or a debt due from him might be *set off* against it, in account; and so the *true owner* of the note might *lose* the whole or part of it, though it was transferred to him upon a valuable consideration.

As to the notion of its being negotiable in *London*, and not elsewhere, there is no foundation for such an imagination. [1530]

1764.

GRANT
v.VAUGHAN.
*The plaintiff,
upon such new
trial, recovered
the money.

tion. It must be equally so out of London, as in London; and it is just the same as a Bank-note.

Upon the whole, I think the jury have done wrong: and therefore the verdict ought to be set aside.

Per Cur' (unanimously and clearly)

RULE made ABSOLUTE (for a * new trial.)

[S. C. 1 Bl.
Rep. 467.]

REX versus JUSTICES OF PEACE for WILTSHIRE.

Presentment
of highways
by justices
on view
traversable.

ON Saturday the 2d of June last, Mr. Thurlow shewed cause why a writ of *mandamus* should not issue, directed to the justices of the peace for the county of *Wills*, commanding them to receive and proceed upon a TRAVERSE to a certain PRESENTMENT made by a justice of peace upon view, against the inhabitants of the tything of *Connock* in the same county, for not repairing a highway within the said tything.

[See 6 Durn.
830.]

The cause shewn by Mr. Thurlow was, that, as this was a presentment in the sessions made by a justice of peace upon his own knowledge "that the highway was out of repair," a GENERAL traverse could not be admitted: for though such a presentment by a justice of peace upon view be traversable as to all other points, yet it is *conclusive* so far as the view and knowledge of the justice goes; and the fact of its being out of repair can not be disputed. Consequently, though a special traverse ought to be received, a general one ought not.

This power of presentment by any one justice upon his own proper knowledge, "of any highway not being well" and sufficiently repaired and amended," is given by 5 *Eliz. c. 13. § 9.* which refers to 2, 3 *Ph. & M. c. 8.* And 3 *W. & M. c. 12.* has also a relation to the same subject.

And it has been holden, "that the party against whom such a presentment is made, can not take a traverse to the want of repair of such highway."

Keilway 34 a. *Dalton, c. 26. Crompton* 110. (not 131, as it is cited by *Hawkins.*) *Hawkins's P. C. Lib. 1. c. 76.*

[1531] § 72. p. 217. (who acknowledges this, though he does not enter into the reason of such an exposition of the clause. *Dyer* 13 b. p. 64.)

* See this case in 5 Reports;

viz. 4 Mod. 38. Trin. 3 W. & M. 1691. Holt, 338. S. C. of the same term 12 Mod. 13. S. C. of the next term, M. 3 W. & M. 1691. 1 Shower, 270. of Trin. 3. and 291. of M. 3 W. & M. Carthew, 212. of a later term than any of the others, namely, Hil. 3 W. & M. 1694. Not one of these five reporters say what became of the case, excepting that Shower, in p. 291. says, "Per cur. ordered to stay." Note, Three of the first four represent even Holt himself to say "that the defendant may traverse." The words here cited by Mr. Thurlow are taken from Carthew's Report of the case.

Hornsey, in *B. R.* Lord Ch. J. *Holt* held, that where a justice of peace presents a highway upon his *view*, to be out of repair, there the parties are *estopped* to plead "that it is *in* repair." It is true indeed, that the other judges were against him; and held, "that the parties *might* traverse the non-repairing, though the presentment was on view."

1764.
REX
V.
WILTSHIRE
JUSTICES.

Mr. *Dunning*, *contra*, argued in support of the rule, that the justices were obliged to receive the traverse *generally*; and that the defendant had a *right* to traverse the ways being *out of repair*, notwithstanding that the presentment was made by the justice upon *his own view*.

The words of the 5 *Eliz. c. 13*, § 9. are that "every justice of peace shall have authority, upon his own knowledge, in the open sessions, to make presentment of any highway not well and sufficiently repaired and amended, &c. And every presentment made by any such justice of peace upon his own knowledge as is aforesaid, shall be AS GOOD and of the SAME force, strength and effect in the law, as if the same had been presented, found and adjudged by the oath of twelve men.

It can therefore be NO MORE than equal to an indictment, or to presentment by twelve men on their oaths: both of which are traversable in all points. The traverse must apply to the thing presented: and that is the want of repair. It is traversable in the same manner as indictments for forcible entries, or for trespass: that is in all points.

Serjeant *Hawkins*'s own opinion is in point, against the old exposition of the clause; which (by the way) is not to be found in the books referred to in his margin†: the statute expressly saves to every person that shall be touched by any such presentment, "his LAWFUL TRAVERSE to the same presentment, as he might have upon any indictment of trespass or forcible entry, by the laws of this realm, before the making of that statute:" and, as the serjeant thinks, it is clear, "that every defendant to any such indictment may traverse the whole matter alleged against him." Therefore he ought to have the same benefit, in the present case.

[1532]

A coroner's inquest finding a person *felo de se*, is traversable.

THE COURT thought proper to enlarge the rule, to the present *Trinity* term. For, it appeared, upon a discussion of the question, at the bar, and on the bench, and upon inquiry into the practice in different counties, that there had been a great VARIETY both of OPINION and PRACTICE about this matter.

Mr. Justice *WILMOT* said, that a notion had long prevailed, and seemed to be countenanced by the

1764.

REX

v.

WILTSHIRE
JUSTICES.

old books, "that a presentment made by a justice of peace, pursuant to 5 Eliz. c. 13. § 9. of a highway's " being out of repair, could *not* be controverted as to the " facts of its being out of repair;" and he knew that the late Mr. Justice Abney was of that opinion, and thought " that the statute had trusted the eye of the justice with " the view of the repair:" but he did not know, he said, of any *judicial determination* that way. And he had always understood, that for about thirty years past, the notion and practice had been *contrary*: and for his *own* part, he understood such a presentment to be as *traversable* as an indictment. And the act of parliament puts it upon the same foot: for the word "*adjudged*" by the oath of twelve men, means nothing more than *found* by a grand jury. The words of this act can only apply to the *repair*: and the traverse puts the fact of its sufficiency immediately in issue.

Mr. Justice YATES observed, that there is no jurisdiction in this kingdom, where a defendant can be convicted *unheard*.†

† V. Rex v.
Roupel, Tr.
1776. 16 G. 3.
B. R. presented
at a leet
for keeping a
bawdy-house.

And Lord MANSFIELD thought the reasons for its being *traversable*, to be very strong.

The RULE was enlarged.

And—

Lord MANSFIELD now declared (generally and without saying more,) that they were all of opinion, that " a *mandamus* should go, commanding the justices to " receive and admit a *general* traverse."

RULE made ABSOLUTE.

[1533]

Friday, 6th,
Monday, 9th
of July, 1764.

Intention of a
testator to be
collected from
the whole of
the will.

[See 3 Du. R.
359.

5 Durn. 14,
593.]

BADDELEY versus LEPPINGWELL.

THIS was an action of trespass for breaking and entering the plaintiff's close called the Hop-ground. The defendant pleads " not guilty;" and also a justification of his entry, under a grant in fee from *Thomas Ashurst*, esq. lord of the manor of *Heddingham*-borough in *Essex*, made to him on 10th *December* 1761, by his steward, at a court-baron; to hold the said close to him and his heirs, by copy of court-roll, according to the custom of the manor. The plaintiff, in her replication, admits that *Thomas Ashurst*, esq. was lord of the manor of *H.* and was seised in fee of the close: but alleges that at a court of the said manor holden upon the 3d of *July* 1754, he made a prior grant of it to the plaintiff and one *Ellen Baddeley* her sister; to hold in coparcenary, by copy of court-roll: and that *Ellen* died; and thereupon, at a subsequent court, the lord granted her moiety to the plaintiff in fee, and she was admitted thereto on 25th *June*, 1756 and so became sole seised. The defendant, in his rejoinder, alleges,

See 6 C. R. 111
Dig. Tit. Descent
204 § 1

that the lord had made a former grant to *Thomas Ives*, in fee; who died; and the premises thereupon descended to *Thomas Ives*, his nephew and heir; who conveyed the same to him the defendant, and traverses the GRANT alledged in the replication to have been made by *Thomas Ashurst*, esq. to the plaintiff and her sister *Ellen Baddeley*, in manner and form as in and by the replication is alledged. And upon this traverse of the GRANT alledged in the replication, *issue* is joined.

1764.

BADDELEY
V.
LEPPING-
WELL.

The cause was tried at the *Essex* assizes, before Mr. Justice *Bathurst*: and a special case was stated to the following effect.

The trespass being proved, upon the first issue taken upon the plea of not guilty, the case (upon the second issue) appeared to be—

That *Thomas Ives* was seised in fee of the place where it was committed; and that he surrendered it to the use of his will, and then made his will, and died: which will was as follows—"In the name of God: amen. I *Thomas Ives* of *Castle-Heddingham* in the county of *Essex* victualler, being, &c. do make, &c. I give and bequeath unto *Clement Boreham* of *Rowhedge* in the said county of *Essex* victualler, the house I now live in, situate and being in *Castle-Heddingham* aforesaid, and called or known by the name or sign of the *Cock*, for and during the term of his natural life; he PAYING THEREOUT yearly and every year, by half-yearly payments, forty shillings a year to *Robert Boreham* my grandson: and after the decease of the aforesaid *Clement Boreham*, to be equally divided to *Robert Boreham*, *Sabill Boreham*, and *Jeremiah Boreham*, the children of *Robert Boreham* deceased. Item, I give and bequeath my two copyhold tenements now in the tenure or occupation of *Edward Twogood* and *Elizabeth Savill*, widow, being in *Castle-Heddingham* aforesaid, to *Sarah Boreham*, the daughter of *Elizabeth Boreham* widow; she paying THEREOUT forty shillings a year to her sister *Elizabeth Boreham*. Item, the forty pounds that my daughter *Elizabeth Boreham* aforesaid has of mine, I give to *Anne Boreham* and *Mary Boreham* my grand-daughters: to wit, 20l. a-piece share and share alike. Item, I give and bequeath to my brother *John Ives* 50l. and do also acquit him of a note I have under hand for 80l. more. Item, I give to the children of *John Fardersworth* that he had by his first wife, 15l. Item, I give to *Sander Walford's* three children fifteen pounds. My mind and will is, that what legacies I have herein given, shall not be paid till after the decease of me and my wife, and three months after. And lastly, I do hereby nominate, make and appoint my said wife, *Clement Boreham* aforesaid,

[1534]

1763. " and *John Ives*, executrix and executors of this my will.
 BADDELEY " In witness whereof, &c. the 3d day of *December* 1740.
 v. " *Thomas Ives*."

LEPPING- That the estate devised by the will of the said *Thomas*
 WELL. *Ives* to *Sarah Boreham* consisted of two cottages and the
 HOPE GROUND in question; and was, at the time of his
 death of the yearly value of FIVE pounds and six shillings.

That at a court-baron holden for the manor of *Heding-*
ham-borough on 4th *April* 1743, *Sarah Boreham* was ad-
 mitted to the said premises, (*prout* the admission;) and
 made a surrender to the use of her will; and afterwards
 devised the same (*prout* the will;) and died.

That at a court-baron holden for the said manor on
 17th *June* 1747, *Elizabeth Boreham* was admitted, (*prout*
 that admission.)

That at a court-baron holden for the said manor on
 the 3d *July* 1754, the plaintiff and her sister *Ellen* were
 admitted to the premises in question, (*prout* that admis-
 sion.)

The defendant claimed under *Thomas Ives*, the son of
John Ives who was brother and heir (according to the
 custom) to *Thomas Ives* the testator; and at a court
 [1535] holden on 10th *December* 1761, was admitted to the
 premises in question, (*prout* his admission.)

The questions submitted to the court were—

1st. Whether *Sarah Boreham* took an estate in fee,
 or for life only, under the will of *Thomas Ives*.

2dly. If she took an estate for life only, then whether
 the defendant could take advantage thereof, on the issue
 joined upon these pleadings.

Mr. Leigh argued for the plaintiff: *Mr. Ashhurst*, for
 the defendant.

Mr. Leigh insisted (upon the 1st question) that *Sarah*
Boreham took an estate in fee, under this devise of the
 tenements "to her, she PAYING thereout forty shillings a
 "year to her sister *Elizabeth Boreham*."

[1 Bosanq.
 560.]

For where a testator lays such a charge upon the estate
 devised as may render it, by any possibility (even though
 not within probability) a burthen instead of a benefit to the
 devisee, in any year; the devisee shall take in fee: other-
 wise, indeed, if the payment is only directed to be made
 out of the rents and profits.

Now in the present case, *Sarah* the devisee may be a
 loser by the devise, unless she takes a fee: for, the annuity
 charged upon her is not restrained to Sarah's own life;
 but is a continuing annuity. And as the testator intended,
 that the annuity to her sister *Elizabeth* should continue
 during *Elizabeth's* whole life, he certainly meant to devise
 a fee to *Sarah* who was charged with the payment of it.
 And this intention with regard to the present devise is

+ see Dyce 371, 6.

strengthened by his being *explicit* in the former devise to *Clement Boreham* "for and during the term of his natural life; he paying thereout yearly and every year 40s. a year to *Robert Boreham*:" whereas he adds no such restrictive words to *this* devise to *Surah*.

1764.
BADDELEY
v.
LEPPING-
WELL.

He said it was not necessary to cite cases; because the principle is clear, (though they might differ in the application of it,) and all the cases prove it. However, he would mention one, in point: which was that of *Reed v. Hatton*, in 2 *Mod.* 25. a devise "to *R.* upon this condition, that he pay unto his two sisters 5l. a year:" and the houses were worth 16l. *per annum*. This was holden to be a fee: for, "if there be a possibility of a loss, (though not very probable that the devisee may be damnified,) it shall be construed a fee. If *A.* devise 100l. *per annum* to *B.* paying 20s. it is not likely that the devisee should be damnified; but it is possible he may." And judgment was given accordingly.

[1536]

2d Question—But supposing that we were to fail in this first point, yet as this is a mere *possessory* action, it is enough for the plaintiff, if she can *destroy the defendant's title*: it is not necessary, in a mere possessory action, for the plaintiff to set out a title, *unless* he is obliged to it by the defendant's setting out one in himself: which the defendant has *not* done in the present case. He says indeed in his rejoinder, "that the lord made a prior grant to *Thomas Ives*; whose heir conveyed to him." But this ought to have been *SPECIALLY pleaded*: whereas, here, he has only traversed the lord's GRANT to the plaintiff; by which traverse of the grant, only the *legal operation of the grant itself* is put in issue; not the *title* of the plaintiff. He can not, *upon this traverse*, go into the title of *Thomas Ives*, or give evidence of any thing foreign and extrinsic to the point in issue. If he would have done this, he should have pleaded the matter *specially*. But upon the *present issue*, the plaintiff could not tell how to direct his evidence: for, the defendant might as well claim under any other person, as under *Thomas Ives*. The defendant could no more go into *title*, upon *this* traverse, than he could have done upon the general issue. In *Hobart* 72. *Humberton v. Howgil*, issue was taken upon the seisin of *Thomas Howgil*: and the jury found that "*Thomas* had made a feoffment to *John Howgil*;" but added—"that it was made *by covin*, to defraud the plaintiff and other creditors." It was judged for the plaintiff: for, *Thomas* remained still seised, as to the creditors, notwithstanding the feoffment. But if the issue had been taken directly, "*infeoffed or not infeoffed*," it had been found *against* the plaintiff. For, in *that* case, he must avoid the feoffment, by *covin especially pleaded*; for, it is

1764. a feoffment, *tiel quel*: as, you can not plead "*non est factum*" generally, upon the statute of usury, or the statute of sheriffs. But here (says the book) the issue is general, "*seised or not seised by the feoffment*;" and therefore the *verin may be given in evidence*, when the *feoffment* is given in evidence. So in the present case, the issue being taken on the *grant*, it was enough for us, to *prove the admission*, as stated in our replication: which we *did* prove. If the defendant could have invalidated it, *that* ought to have been done by *special pleading*.

Mr. Ashhurst, *contra*.

[1537] 1st. The intention of the testator is indeed a general rule for the construction of wills, in cases where it is plain, and clear, and positive, and excludes every other implication: but an heir at law shall not be disinherited without an absolute necessary implication. *Vaughan* 262. *Gardner v. Sheldon*.

It is true, that where the devisee is charged with the payment of a *sum in gross*, he shall have a fee, though the estate be not devised to him "*and his heirs*:" but if it be an annual payment out of the thing devised, it will not create a fee, without apt words; because the devisee can not lose by the devise. This distinction is laid down in *Cro. Car.* 158, 159. *Ansley v. Chapman*, and in *Collier's* case, 6 Co. 16. And here the value of the thing devised is 5l. 6s. *per annum*; and the charge is only 40s. *per annum*. So that the devisee may pay it out of the profits, and is *sure to have no loss*. And *Collier's* case is most expressly in point, "that this is but an estate for life." But the very words of this will are as explicit as possible—"she paying THEREOUT." Which circumstance distinguishes this case from that of *Reed v. Hutton*, where the words only were "that he pay unto his two sisters 5l. a year;" (not saying, "out of the profits.") Possibly, that case might have been so circumstanced, that the devisee stood a chance of being a loser: here she certainly could not. In the former devise to *Clement Boreham*, the testator expresses his intention "that it should be only for his life:" and the two clauses being exactly similar, must be construed both alike. There is nothing in this will, from whence it can be inferred that the testator intended that the annuity which *Sarah* is to pay to *Elizabeth Boreham* should continue during *Elizabeth's* life. The contrary seems rather to be implied: for, the testator gives a like annuity to his grandson *Robert Boreham*, in the same words, out of *Clement Boreham's* house which he has expressly devised to *Clement* for life only. And it does not clearly appear, that *Robert Boreham*, who was to have a share in the reversion after *Clement's*

death, was the same person as *Robert Boreham* the annuitant.

1764.

2d Question—It is objected, that upon *this traverse*, nothing but the *effect of the grant* can be controverted.

BADDELEY
V.
LEPPING-
WELL.

But the pleading in cases of *copyholds* is different from the pleadings in cases of *freeholds*. A copyholder has, in the eye of the law, only an estate at will; and in pleading, he may allege an admittance as a grant. But the lord is only an *instrument*: he can only transfer an estate according to the surrender, and according to his authority. He can not vary in person, estate, tenure, or in any other collateral points: if he exceeds his authority, his admittance is good only *pro tanto*. *Coke's Complete Copyholder*, p. 52, 53. § 41.

[1538]

Now if *Sarah Boreham* was (as we say she was) only tenant for life, she then had no estate which she could devise at her death: but immediately upon her death, the heir of the testator *Thomas Ives* became intitled to the reversion. Consequently the admission of the plaintiff and her sister *Ellen* (mentioned in the replication) of the 3d July 1754, is in effect a grant of *nothing*. The defendant in his rejoinder therefore *denies*, that the lord then granted the estate in manner and form as is alleged by the replication; and shews a title in himself, inconsistent with it. He was obliged either to admit that title, and derive under it; or to *traverse* it. And having traversed the plaintiff's, he properly sets up his own. This admittance was *not*, in fact, a *grant* of the thing itself; it is incumbent upon the plaintiff, to shew that it *amounts to a grant*, in point of law.

The case of *Humberton v. Howgil* in *Hob.* 72. is distinguishable from this case: for, there the feoffment was not void, but only *voidable*; it would operate between the feoffor and feoffee, though not to defraud creditors. But where the feoffment is absolutely *void*, it may be given in evidence upon a plea of *non feoffavit*: *Bro. Abr. Title General Issue*, p. 73. expressly. So, if a bond is *void*, (as the bond of a feme-covert,) this may be given in evidence, upon "*non est factum*" pleaded: but *not* where *voidable only*, (as the bond of an infant.) So here, the admission is a *nullity*; it is *no grant at all*; (for the party admitted had *no right*;) therefore the defendant may with propriety say, "that the lord made *no such grant*."

As the plaintiff, being a *copyholder*, could not plead a *title*, but could only plead it as a *grant from the lord*, the defendant could only traverse the *grant*.

Mr. Leigh, in reply—

1st. Insisted that the charge of the annuity to *Elizabeth* might have continued *longer than Sarah's life*: and

1764.
BADDELEY
v.
LEPPING-
WELL.

[1599]

therefore the devise might have been *prejudicial* to Sarah, instead of *beneficial*, if it was to be construed only a *life-estate*. And he relied upon the case of *Ansley v. Chapman*, in *Cro. Car.* 157. (which, he said, proved strongly for him;) and on that of *Reed v. Hatton*, in 2 *Mod.* 25, and also now added another, *Lee v. Stephens et al'* 2 *Shower* 49. where a devise to *James*, conditionally, "that he shall allow to *Nicholas*, meat, drink, apparel, washing, and lodging during his natural life," was adjudged a fee. So the present devise was intended, he said, as a provision for both sisters; and it was not meant that the annuity should cease upon the death of Sarah: and it was payable *out of the estate*, not out of the rents and profits. In that case of *Lee v. Stephens et al'* *Pemberton* took a diversity between those cases where the money to be paid was somewhat *granted and secured before the death of the testator*; and those where the charge is *laid by the testator* on the devisee.

2dly. The defendant could not put the plaintiff to shew any other title than the grant of the lord. In a possessory action, a defendant can not drive a plaintiff to shew a title, without first shewing one in himself.

The difference of pleading, in case of freehold and in case of copyhold, is only in point of *form*.

This grant of the lord is *not void*. And the defendant not having *pleaded* any bar to it, he *can not* give any in *evidence*. This grant cannot be compared to the bond or to the feoffment of a feme covert: for, they are absolute nullities; but this is not.

The case of *Humberton v. Howgil*, in *Hob.* 72. is in point.

Lord MANSFIELD was gone; and Mr. Justice DENISON absent: and the other two judges having some little doubt on the first point, though none on the second, took time till *Monday* to consider of it. And on *Monday* the 9th of *July*,

Mr. Justice WILMOT declared their opinion in favour of the plaintiff. He premised, that there was an apparent *inconsistency* in the state of the case, as it stands drawn up for the opinion of the court; for, upon the face of the *stated case*, it appears that *Thomas Ives* the devisor left a *daughter and grand-daughters*; and that the plaintiff is *grand-daughter* to him; and that the title is in *her* as his heir at law, or at least can not be in the *defendant* as claiming under *Thomas Ives* as his heir at law: for, *Sarah's* mother, *Elizabeth Boreham*, was the testator's own daughter; and here is no mention of any custom to exclude females; nor did he ever hear of such a custom, he said, in any manor. And yet it is admitted upon the case, "that *John Ives*, the testator's brother, was his heir

"according to the custom:" and the defendant claims under him as being so. But if in fact he was *not* so, there seems to be an end of the defendant's pretensions. 1764.
BADDELEY
v.
LEPPING-
WELL.

* However, two points are, by the case, submitted to the opinion of the court:

1st. Whether *Sarah Boreham* took an estate in *fee*, or for *life only*.

2d. Whether (in the latter case) the defendant could take advantage of it, upon *this* issue joined upon *these* pleadings.

On the 1st point, he owned that he had, at first, had some doubt: but that doubt was removed.

The plaintiff, at the trial, derived her title under the will of *Thomas Ives*; who after having surrendered to the use of his will, devised to *Sarah Boreham in fee*, (as the plaintiff insisted :) which *Sarah Boreham* was admitted, and surrendered to the use of her will, and devised the estate to her sister *Elizabeth Boreham in fee*. *Elizabeth* married *Baddeley*; and had two daughters by him, *viz.* the plaintiff and her sister *Ellen*, who took as coparceners, and were admitted accordingly; and on *Ellen's* death, her moiety descended to the plaintiff; and she was admitted to it, and so became sole seised.

But the defendant insisted that *Thomas Ives's* devise to *Sarah Boreham* gave her nothing more than an estate for *life*: and consequently, she had no power to devise. And he makes his claim under the heir at law (as he is stated to be) of *Thomas Ives* the devisor.

The plaintiff's counsel insisted that the devise to *Sarah Boreham* must be construed to be a devise in *fee*: but even if it was not so, but only a devise to her for *life*, yet that the *fact* of the grant to the plaintiff and her sister *Ellen* was the *only* matter now in issue; and the defendant could not, under *these* pleadings, take advantage of the plaintiff's want of title.

The first question is the *material* point: and we are of opinion "that *Sarah Boreham* took an estate of inheritance."

The short of the case is, that *Thomas Ives*, being seised of a house, and of two copyhold tenements, and having a daughter and several grand-children, made his will, and devised the house to *Clement Boreham for his life*, he paying thereout 40s. a year to *Robert Boreham* the testator's grandson; and after *Clement Boreham's* decease, to be equally divided between *Robert*, *Sabill*, and *Jeremiah Boreham*, the children of *Robert Boreham* deceased, (who were his three grand-sons :) and he gives his two copyhold tenements to *Sarah Boreham*, she paying thereout 40s. a year to her sister *Elizabeth Boreham*. Then he gives

[2 Bl. Rep.
939.]

[1541]

1764. 40l. to two grand-daughters, *Anne* and *Mary Boreham*; and makes several other bequests.

BADDELEY

v.

KEPPING-
WELL.

[See *Cole v. Rawlinson* in *Salk.*]

My Justice WILMOT, after having thus stated the will, laid down this general position—"that the intention of a testator is to be collected from the *whole* of his will, *ex visceribus testamenti*; so as to leave the mind quite satisfied about what the testator meant: and as a will of lands must be in *writing*, such collection of the testator's intention must be founded upon *the writing itself*."

THIS is the principle. The only difficulty is upon the application.

Particular cases serve rather to obscure and confound, than to illuminate questions of this kind: and no case in the books exactly tallies with the present. Therefore the gentlemen who have argued this case have acted very properly in mentioning only a few; and have rightly put it upon the *intention* of the testator.

Now I collect that intention (he said) first, from the devise to *Clement Boreham*; and then, from the devise to *Sarah Boreham*.

He devises to *Clement*, expressly, "*for and during the term of his natural life*; and, *after his decease*, to *Robert Sabill*, and *Jeremiah Boreham*." But in the devise to *Sarah*, he omits the words "*for and during her life*:" which words it must be supposed he would have inserted, in case he had intended to give her only an estate for life; because he had just before done so, in the preceding devise to *Clement*. It is plain, that by giving it to her generally, without having any such restrictive words, as he had before added to his devise to *Clement*, that he meant to give her the *absolute* property: he meant to devise it *ut bona et catalla*: as a man unacquainted with the law might very naturally do. And his making *no limitation over*, in this devise to *Sarah*, is an additional and auxiliary proof of his intention to give it to her *absolutely*. But the material circumstance is the condition he has annexed to her estate, of *paying an annuity* to her sister *Elizabeth Boreham*.

[9 Bos. 253.]

3 Danv. 177.]

It is objected, "that he has expressly directed the 40s. a year to her sister *Elizabeth* to be paid THEREOUT:" and it is urged, "that this is *equivalent* to making it payable out of the RENTS AND PROFITS." And I think it is so. Therefore this is *not* to be considered as a charge

[1542]

of a payment of a sum of money *in gross*. But, by a subsequent clause, he gives 40l. (to wit, 20l. a-piece) to two other grand-daughters, *absolutely*. Therefore he probably meant that *this* grand-daughter *Elizabeth Boreham* should have her 40s. a year upon the *same* foot; and that the provision he had thought proper to make for her should be a

lasting one, to continue during her life; and not, that she should be left to starve, in case her sister Sarah should happen to die before her: and consequently he must have intended that the annuity which Sarah was to pay to her sister Elizabeth should be an annuity during the life of Elizabeth. And if so, then it follows, that this charge of 40s. a year to Elizabeth is just the same thing as devising an annuity to her; though it is put in the form of a condition. And Mr. Ashhurst very candidly admitted, that if this was an annuity for life to Elizabeth, it would make it a devise in fee to Sarah. And as this could not be effectuated without construing the inheritance to be given to Sarah, it raises a very violent presumption "that the testator intended her an estate of inheritance." He just mentioned, in delivering this part of his opinion, the case of *Shaw and Weigh*.

But the case that comes nearest to the present, he said, though not exactly up to it, is that of *Read v. Hatton*, 2 Mod. 25. Where the estate was given "upon this condition, that the devisee pay unto his two sisters five pounds a year:" and here, the words amount to a condition "that she pay her sister 40s. a year." Indeed that will did not direct it to be paid "thereout," as this does: but that was a devise upon a condition to pay the annuity; (for the words there printed in a different letter from the rest of the case, seem to be the very identical words of John Thatcher's will.) And judgment was there given for the defendant: for that "the estate being limited to the devisee, and charged with payments to the sisters during their lives, doth plainly prove the intention of the testator was, that the devisee should have an estate in fee simple."

Mr. Ashhurst endeavoured to answer this case by that of *Ansley v. Chapman*, in Cro. Car. 157. Where William Lock, being bound in an obligation "that 40l. should be paid annually to his wife during her life," made his will, and devised to his sons; and added, that his devise to them was to this purpose, "that they all shall bear part and part-alike, going out of all his houses and lands, towards the payment of my wife's 40l. per annum during her life, which I am bound to pay: and which of my sons refuse to bear their part, I will that he or they shall enjoy no part of my bequest given unto them; but my gift given unto them shall go to the rest of my well-willing sons."

The true answer to that case is, that the charge to the wife is not imposed by the will; but the will gives it an additional security: for, the testator stood previously bound to pay the annuity.

Mr. Ashhurst also contended, that the annuity payable

1764.

BADDELEY

V.

LEPPING-

WELL.

V. post.

Frogmorton

v. Holliday.

Friday, 1st

Feb. 1765.

See Real Case
Observed on
per 2d Hen
72 294-

[1543]

1764.

BADDELEY
v.
LEPPING-
WELL.

to *Elizabeth Boreham* would determine upon the death of *Sarah Boreham*, the devisee; in the same manner as *Robert Boreham's* annuity would determine upon the death of *Clement*.

But *Clement's* death only *changed Robert's* annuity into an interest in a third part of the estate; for, *Robert Boreham* the annuitant upon *Clement*, and *Robert Boreham* one of the three reversioners after *Clement's* decease, seem to be the *same person*. But if not, yet still there is a great difference between the two devisees. The devise to *Clement* was *expressly* for his *life*: the devise to *Sarah* had *no* such restrictive words. I think the testator did *not* intend that *Elizabeth's* annuity should drop with *Sarah's* life: * IF he had intended that, he would have expressed himself otherwise than he has done.

* Vide post.
See p. 1542.
in margine.

At all events, the plaintiff seems intitled to the estate. On the 2d point—The case is extremely clear. It depends upon the nature of *copyhold* estates.

[4 Co. 22. b.
Ld. Raym.
1231.]

FORMERLY, *copyhold* estates were made tenancies *at will*; a *middle* estate between freeholders and villains: at length, they acquired *stability*, by *custom*. The lord is not intitled to his fine, till admittance: but the *admittance* is merely * *form*. On a surrender of a *copyhold*, the estate *remains in the surrenderer*, till admittance. The lord, by the custom, has only a customary power to make admittance *secundum formam et effectum sursum-redditionis*; and therefore it is *not* like the case of *feoffees* to uses, at common law. And although the lord grant the land over by copy to another, this is all without any warrant: for, notwithstanding this, the lord may make admittance according to the surrender; and this shall be *good*; and he who is admitted shall be in, *by* him who *made the surrender*. The estate must be according to the *surrender*, and *not* according to the *admittance*. This is a known and common doctrine; and is laid down fully, in *Coke's Copyhold Cases*, 4 Co. 28. b.

*V. post 1958.
Noden v.
Griffiths et al.
18th Nov.
1766, accord.
[Actus legi-
timi non reci-
piunt modum.
Branch 2.
lin. ult.]

The present admittance was upon a *descent*: for, the plaintiff and her sister *Ellen* held in coparcenary. The defendant could *traverse* nothing here, but the *grant* which the plaintiff had alledged in her replication. And *if* she was *not* heir, the admittance of her, as such, is *void*.

[1544]

He then stated, at large, the case of *Humberton v. Howgil*, in *Hob.* 72, and observed that there is a material difference between a *feoffment* and a *grant*. In a *feoffment*, the *livery* is a material part, and transfers the possession. If another person was in possession, both the *feoffment* and *livery* would be void; even though the *feoffment* was by deed. And Mr. *Ashhurst's* case (cited out of *Bro. Abr.* General Issue 73,) applies to this, "that

"where a feoffment is *totally void*, it may be given in 1764.
"evidence upon a plea of *non feoffavit*."

"*Non concessit*," puts the OPERATION of the grant in question. If a man pleads a grant from the crown under the great seal; and the other pleads "*non concessit*," in this case the *letters patent* are confessed; but the effect and operation of them is denied: the effect of that issue of "*non concessit*," is, that the crown *had nothing* in the land; or, that the tenements *did not pass* by the letters patent. So is *Hynde's* case in 4 Co. 71. b. and *Eden's* case in 6 Co. 15. b. expressly.

A grant without right is *absolutely void*.

If *Sarah* took a fee under the will, then the admission of the plaintiff in fee is good, and all is right: but if *Sarah* took only an estate for *life* under the will, then the grant to the plaintiff was void, and the grant to the defendant *Leppingwell* would be *substantiated*; he claiming under the heir at law of the testator; and *Leppingwell* would not, in *that case*, be a wrong-doer.

Therefore if it had rested on *that*, I should think that the *validity and operation* of the grant *would* have come in question upon this issue.

On the other hand, if she took an estate of *inheritance* (as we hold that she did,) this totally varies the case. For, then the plaintiff had a *good* title under her devise and the subsequent descent; and *Leppingwell* could have none under the heir at law: and *possession alone* would be sufficient for her to maintain this action against *Leppingwell*; though it would *not* have been so, in case the *real title* had been in *Leppingwell*.

RULE—

That the *postea* be delivered to the PLAINTIFF.

BIDLESON, Esq. Administrator, &c. *versus* WHYTEL, Esq.

[1545]
Tuesday, 10th
July 1764.

[S. C. 1 Black.
506.]

UPON Monday the 8th of November 1762, the following question came before the court, (upon an adjournment over from the preceding Trinity term;) viz.
"Whether the plaintiff in a writ of error brought upon
"a judgment obtained in an action of *debt* commenced
"in this court, upon a former judgment obtained here
"by the administrator-plaintiff's intestate, in an action of
"debt upon a bond conditioned for the payment of money
"only, (which former judgment was CONFESSED by warrant of attorney,) was or was not obliged to put in bail
"onsuing out such writ of error; upon the statute of
"3 J. 1. c. 8:" (for it was agreed not to be within the

No bail is requisite on error of a judgment in an action of debt on judgment.

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1764.

BIDLESON

v.

WHYTEL.

[See post.

1568, 2118.

1 Bosan. 349.

2 East, 360.]

statutes of 13 C. 2. st. 2. c. 2. or 16, 17 C. 2. c. 8. which extends only to writs of error *after verdict*.

The rule was upon the administrator-plaintiff, to shew cause why the return of the writ of *capias ad satisfaciendum* issued in this cause should not be *set aside*, and the *proceeding against the bail* of the defendant *stayed*; with costs to be taxed by Mr. Owens: and in the mean time, further proceedings to be stayed.

The case was this, as to the facts—The administrator-plaintiff's intestate had brought an action of debt in this court, for 340l. upon a bond conditioned for payment of money *only*; and obtained judgment for the penalty, *by confession*, upon a warrant of attorney given for that purpose; (so that there was no bail then put in;) and afterwards died. Then his administrator (the now plaintiff) brought a *second action of debt*, in this court, grounded upon that former judgment obtained by his intestate: to which *second action* the defendant *put in bail*; and then pleaded "that the intestate *had not bonu notabilia, &c.* and therefore the *prerogative administration was void*." This plea was overruled, on demurrer: and the administrator thereupon had judgment.

Upon this *second judgment*, the defendant brought the present writ of error; *without entering into such a recognizance* as is required by 3 J. 1. c. 8. The attorney for the plaintiff (the administrator) conceiving that execution was *not stayed* by this writ of error, for want of such a recognizance, proceeded to get the *ca. sa.* returned, and went on against the defendant's bail, in the same manner as if no writ of error had been brought. And the question was "whether he was or was not *REGULAR* in so doing."

[1546]

The words of 3 J. 1. c. 8. (intituled "an act to avoid unnecessary delays of execution") are—"That no execution shall be stayed or delayed upon or by any writ of error or *supersedeas* thereupon to be sued, for reversing any judgment in any action or bill of debt upon any *single bond for debt*, or upon any obligation with condition for the *payment of money only*, or upon any action or bill of debt *for rent*, or upon *any contract*, sued in any of his highness's courts of record at *Westminster*, or, &c. &c. *unless* such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, &c. shall first, &c. be *bound, &c. by recognizance, &c.* to prosecute with effect, &c. and also to satisfy and pay, &c. all and singular the debts, damages and costs upon the former judgment, and all costs and damages to be also awarded for the same delaying of execution."

Mr. Solicitor General, Sir *Fletcher Norton*, on behalf of the plaintiff in error, argued, that he was *not* obliged to enter into any recognizance, in the present case; and that the writ of error (when allowed) being a *superedeas* at common law, the plaintiff's *subsequent* proceedings were consequently *irregular*, and must be set aside as being so: for, this was not within any of the four cases specified in 3 J. 1. He confined himself to *this* statute: for that it could not, he said, be within either 13 or 16 C. 2. because it was not after verdict. And he cited 2 Bulstr. 53. *Gilling v. Baker*, as an authority for him upon the *reason* of it: where Mr. Justice *Doddridge* says, "that debt for arrearages of an account before auditors is clearly out of this statute; for, this is a debt *grounded upon record*." Now, so is the present debt a debt *grounded upon record*.

1764.

BIDLESON
v.
WHYTEL

He added, that this statute of 3 J. 1. had been always construed *strictly*, and *never extended by equity*: and he urged, that there was the less reason for it in the present case, because an action of debt brought upon a former judgment is a hard and oppressive action, and ought not to be encouraged.

Therefore he prayed to make the rule absolute.

Mr. *Stowe* and Mr. *Wallace*, *contra*, on behalf of the administrator, (who was plaintiff in this court, and defendant in error,) agreed that the case was not within the statutes of 13 & 16 C. 2. because there had been *no verdict*: but they insisted, that the plaintiff in error was *within* 3 J. 1. c. 8. And that the plaintiff's proceedings were not stayed, for want of the *recognizance* which ought to have been entered into as is directed by that statute.

They said, that this was an action *upon a contract*; [1547] and that the *practice* was to enter into *such* recognizance, upon suing out a writ of error to reverse a judgment in an action of *debt upon a former judgment*; and they cited and relied on two cases; viz. 1 Lev. 260. Sir *Theophilus Biddolph v. Temple*, and *Lucas*, 281. *Hammond v. Webb*, B. R. Hil. 1 G. 1.

They denied, that this act ought to be construed *strictly* and not *equitably*: and they denied that there was any vexation at all in *this* case: because, the original plaintiff being dead after the first judgment, the administrator was *obliged* to institute *some* process to revive it; and *this* method was *safer* than a *scire facias* which might have occasioned the defendant to run away, and then the plaintiff would have had no bail at all, as there was none in the first action, where the judgment was *confessed*.

Sir *Fletcher Norton* observed upon the case in 1 Lev. 260. That if it was not a contract in its original

1764. nature, it could not be *made* so by the judgment of the court.

BIDLESON

V.

WHYTEL.

THE COURT desired to be informed of the PRACTICE; for they thought it a case that must very frequently occur: and they directed the master to look into it.

To which end, it was, for the present, ADJOURNED.

Upon *Wednesday* 26th *January* 1763, Lord MANSFIELD communicated to the bar, and particularly to the counsel concerned in this case, that this matter had been considered by the court, and been very carefully looked into during the recess, particularly by Mr. Justice Denison; and that it appeared to be a *veraxata questio*; and had been *differently* determined, viz. in 10 *Ann. B. R.* "that there should be no bail: and in 2 *G. 1. C. B. temp.* Lord Ch. J. King, that there "SHOULD BE bail:" so that there were, upon the same point, *contrary* resolutions of the two courts.

Therefore this court intended now to consult *all the judges*: because it is a very wrong thing to have *different* rules in different courts, upon the *same* act of parliament. He said, that it had been *agitated* in *C. 2.* time; but not *determined* till 10 *Ann.*

Cur. advisare vult.

[1548] Lord MANSFIELD now delivered the opinion of the court upon this case; declaring, at the same time, that the opinion of *all the judges* had been taken upon it.

He premised, that there was no doubt but that, in the present case, the *original* action require bail. But "whether there ought to be *bail on the writ of error*" brought upon the *second* judgment or not," there had been different opinions in the two courts, of *King's Bench* and *Common Pleas*: the court of *King's Bench* had been of opinion "that bail was *not* necessary;" the *Common Pleas*, "that it *was*." This court held it *not* to be necessary, in a case between *Goodwin* and *Goodwin*,* in the 10th of *Queen Anne*: and this was on full consideration. But the court of *Common Pleas* were of a different opinion, in a case which came before them in Lord Ch. J. King's time, between *Lepson* and *Anderson*, in the 2d of *King G. 1.* There had been judgment in that court, in an action of debt on a *mutuatus*, brought there. An action of debt was brought upon *that* judgment; and the plaintiff obtained judgment in that *second* action. Upon *that second* judgment, a writ of error was brought: and the question before them was "whether there should be bail given upon bringing that writ of error." It was objected, "that the statute of 3 *J. 1. c. 8.* does not extend to writs of error brought upon "actions of debt *on judgments*." And it was urged,

* See S.C. but not S. P. in Viner's Abridgment, Title Bail, letter I. p. 34.

that the statute ought to be *literally* construed; and that the *practice* was so. The court of *Common Pleas* held, "that the CONTRACT was the *foundation* of the whole; "and that if bail might be required in the *first* action, "then there ought to be bail given upon bringing the "writ of error: and therefore they were of opinion, in "that case, that bail *ought* to be given." And they took notice, that the *practice* was *not settled*; for, this court did *not*, in such cases, require bail; but they *did*.

1764.
BIDLESON
v.
WHYTEL.

ALL the judges *now* hold "that bail is *NOT* requisite, "upon bringing a writ of error upon a judgment in an "action of debt *founded upon a prior judgment*."

For they hold—1st, That the *contract* is EXTINGUISHED by the first judgment. 2dly, That a *judgment* is NO CONTRACT, nor can be considered in the light of a *contract*; for *judicium redditur in invitum*. 3dly, Another reason why bail cannot be insisted upon is, that an action of debt upon a *judgment* is an action of a SUPERIOR nature to an action of debt upon bond, or any of the other actions particularly specified in this statute of 3 J. 1. and therefore shall *not be included* in it; agreeably to the reasoning used in the Archbishop of *Canterbury's* case in 2 Rep. 46. b. "That if the makers of the statute "had intended that it should have extended to this "action of a superior nature to those which are specified in it, they would have *begun* with it, and "would have mentioned it *prior* to those of an inferior "nature." 4thly, Another reason is, that this statute ought rather to be taken *literally*, than extended. There was a case of *Taylor v. Baker*, in M. 29 Car. 2 B.R. (reported in 3 Keble, 802.) where *Holt*, upon this statute, prayed bail in error upon a judgment given in an action of debt on judgment: but Mr. Justice *Wild* said, "that "this statute extends not to executors, nor to judgments, "but ought to be *literally* taken; especially, the *practice* "ever since having been *not* to put in bail: and the *enumeration* is only of debts of an *inferior* nature."

[1549]

If it should be thought strange, that bail should be required when the action was only upon a *contract*, and should *not* be required when the action is upon a *judgment*, which is of so much higher a nature;—the answer is, "that in the former case, the legislature *have* required it; "in the latter, they *have not*;" unless a judgment could be esteemed a *contract*, (which we think it can not.)

This is therefore a *casus omissus*: and the statute is *not* to be *extended by construction*; because actions of debt on judgment are, *in general*, oppressive; though there may

1764. be some *particular* cases where they may fairly be accounted for.
- BIDLESON v. WHYTEL. For these reasons, all the judges are of opinion, "that though in the original action bail was requirable, yet it ought *not* to be required on *writs of error* upon *actions of debt brought on such judgments*."
- * V. ante, p. 1545. So that this point is now settled for the future.
- The RULE * therefore for setting aside the return of the *ca. sa.* and staying proceedings against the bail, must be made **ABSOLUTE**; but *not* with *costs*.
- V. post. 1586. (the first case of the next term, *Trinder v. Watson et al.*)

[1550]

WILSON and another *versus* SMITH.

Tuesday, 10th July, 1764.

[S. C. 1 Black-507.]

Insurance free from average unless general does not extend to the damage received by the goods in a storm.

THIS was an action on the case brought upon a *policy of insurance*, for the recovery of 56l. 19s. 8d. *per cent.* being the damage received by a cargo of wheat on board the *Boscawen*, insured at and from *Lancaster to Rotterdam*: which wheat was valued, by agreement, at 30s. *per quarter*. The policy was in the ordinary form. The premium was five guineas *per cent.* And in case of loss, the assured to abate 2 *per cent.* And the assurers to be free from average under three pounds *per cent.* **UNLESS (a) general, or the ship shall be stranded. (b)**

The policy was thus underwritten—

"N. B. Corn and fish are warranted *free from average, UNLESS GENERAL, or the ship be stranded*.
 "DED. Sugar, tobacco, hemp, flax, HIDES, and
 "skins are warranted free from average under *five pounds per cent.* and all *other goods*, free from
 "average under *three pounds per cent.* unless general,
 "or the ship be stranded."

Warranted well in port the 16th day of *February* 1760.

The defendant underwrote this policy for 100l. on 20th *February* 1760.

The defendant having pleaded the general issue, the cause came on to be tried at *Guildhall, London*, on the 15th of *February* 1764, before Lord Mansfield.

The ship, with her cargo, being wheat belonging to the plaintiffs, sailed from *Lancaster* the 21st of *February* 1760.

After her departure from *Lancaster*, and before her arrival at *Rotterdam*, to wit, on the 22d day of *February*

(a) If the word *unless* had not in this case been construed an exception but a condition, the insured would have been gainers by the ship being stranded.

(b) *Magens* 1 v. 76. *Weskott* 244, 535. 7 *Durn.* 216, 220.

1760, sailing and proceeding on her voyage, she met with a violent storm, and was by and through the force of winds and stormy weather obliged to CUT AWAY and LEAVE her CABLE and ANCHOR, for the safety of the ship and cargo; and was also greatly damaged, and obliged to run to the first port (being *Liverpool*) to refit; and that the expence of refitting the ship amounted to 38l. 15s. per cent.

That the hatches of the said ship were not opened at *Liverpool*: but the ship, being refitted, on the — day of *February* 1760, sailed from *Liverpool* for *Rotterdam* with the cargo and arrived thereon the — day of *February*, and there landed her cargo of wheat.

That upon unloading the wheat, it appeared that it had received damage by the said storm, to the amount to 56l. 19s. 8 d. per cent.

THE SINGLE QUESTION was (upon the true construction and meaning of the words “free from AVERAGE, unless GENERAL, or the ship be stranded,”) “whether the plaintiffs can, under the circumstances of this case, recover in this action, for the damage of 56l. 19s. 8 d. per cent.” (the 38l. 15 s. per cent. not being disputed.)

On *Friday* 25th of *May* last, Mr. *Dunning* argued for the plaintiffs, the insured: and Mr. *Morton*, for the defendants, the under-writers.

Mr. *Dunning's* argument tended, in general, to shew that these words amounted to a CONDITION; which condition would render it free from average, unless in two events, viz. a general average, or the stranding of the ship: but if either of these two events happened, then to be liable to average. Whereas Mr. *Morton* endeavoured to shew, that they ought to be considered as an EXCEPTION only; viz. to be free from average in all other cases but these two.

Both agreed in this fact; “that a storm arose; and that the ship was obliged to cut away her cables and leave her anchor; and that the wheat was greatly damaged; and that the average loss on the wheat would amount to a large proportion per cent.”

Neither side cited any common-law cases.

Mr. *Dunning* said, that this clause now in question as to its construction and meaning, was first introduced about the year 1749: before which time, he said, insurers were liable to every injury that happened to the goods insured. This clause, or memorandum was introduced, he said, to deliver the insurers from small averages; and was thought to be a better method of attaining that end, than adapting the premium to the nature of the commodity, as it might happen to be more or less liable to perish or suffer; (which method would have made

1764.
WILSON.
V.
SMITH.

[1551]

1764.
WILSON
v
SMITH.

the policy too much complicated; and which the *Dutch* had at first tried, but afterwards altered.)

He said that both the insurers and insured ought to resort to the *body* of the policy; from whence the meaning of the parties would appear to be "that no average under 3 *per cent.* should be demanded upon *some* commodities; nor under 5 *per cent.* upon *others*; and that *corn and fish* should be subject to *no* average at all, (as being more perishable and damageable commodities,) UNLESS in one or two cases, *viz.* where there should happen a *general one*, or that the *ship be stranded.*"

GENERAL average must arise from some act done to avert great danger, or some distress, where part is destroyed, to save the whole; and therefore *all* ought to contribute.

Here was a *general average*, within the true meaning and intention of this policy. Ordinances of *France* 1681. *Lib. 3. c. 7. p. 81.* Here, *one* of the events has happened; namely, a general average: and therefore the warranty "*free from average*" can not take place at all, in this case.

Mr. *Morton* argued that the meaning and intention of this policy was, that the insurers should not be answerable for any *partial* loss or damage to the goods insured.

The words in question carry a plain and obvious sense; and are an *exception* out of the contract. Their construction stands upon its own bottom.

A *general average* is a general contribution of the owners of the goods on board, (where part is destroyed, to preserve the whole,) in proportion to their concern. If another man's goods had been thrown over-board to save the whole cargo, the owners of the wheat must then have been liable to *general average*, in proportion to the value of their wheat. If the ship had been stranded, the insured might have abandoned. Upon a *general average*, the insurer stands in the place of the owner of the goods: and upon a *total loss*, he is intitled to what may be saved. An average is a contribution by *non-sufferers*, towards the loss of those who *have* suffered for the preservation of the whole. But there is nothing in the present case that can render the insurers liable to an average of 57 *per cent.* on this wheat thus insured by them. They are liable *only* to a general average arising from the loss of the *cable and anchor*: they can not be liable to a *DOUBLE* general average.

Mr. *Dunning*, in his reply, observed, that this could

not be considered as an *exception*; because it was *not* part of what had been, before specified.

Ulterius Conciliu'm.

This case was argued a second time, on *Tuesday* the 26th of *June* 1764, by Sir *Fletcher Norton* (attorney general) for the plaintiffs, and Mr. Serjeant *Burland* for the defendant.

Sir *Fletcher*, first observing that, strictly, the plaintiffs would be *intitled* to recover upon the *general* average, yet acknowledged that the question meant to be left to the court turned only upon the construction of the words N. B. at the bottom of the policy, "free from "average, *UNLESS general* or the ship be stranded."

And he contended, that the true construction must be this—"that wherever there is a general average, or in "case the ship be stranded, *all other partial* averages "should (*if either of those two events happened*) be let in, "upon these perishable goods; just as if there had been "no clause of *freedom from average*, at all." Such clause meant nothing more, he said, than to guard the insurer against such *inherent* loss as might arise from the *nature* of the commodity insured. It means, that the insurer shall be free from all such petty losses too, as necessarily arise in the course of the voyage.

But it can never mean to discharge the insurer from *special* injuries by storms and winds, or from *all average*-losses arising within the *ordinary perils* of the voyage; or that, where there is a general average which the ship, freight and cargo must all be contributory to, he should *only* be liable to *that*, be it ever so trifling and inconsiderable. For this would be no insurance at all: the under-writer would, according to this *narrow* construction, run little or no risque, upon an insurance of perishable goods.

He asserted, that the practice of merchants and the determination of courts of justice were (both of them) agreeable to the construction that he contended for: and moreover, that the *premium* taken upon these insurances bore proportion to this greater risque.

He mentioned a case before Lord Ch. J. *Ryder* in [7 Durn. 215. 1754, between *Cantillon* and the *London Assurance Compa-* 220.]

ny, upon an insurance of corn, with such a clause as this [1554] is: and, the ship being stranded, the plaintiff (the insured) recovered an average loss of about 80 *per cent.* For Lord Ch. J. *Ryder* and a special jury looked upon this as a *condition*; and that by the ship's being stranded, the insurer was let in to claim his *whole partial* average-loss. After which determination, *that company* (he said) had altered that clause in *their* insurances, by *omitting* the words "or the ship be stranded."

Where the ship is stranded, the damage may happen

1764.

WILSON

v.

SMITH.

1764.
WILSON
v.
SMITH.

to be such as would render it *impossible to distinguish* how much of it arises from the stranding of the ship; and how much of it from the perishable nature of the commodity.

Mr. Serjeant *Burland*, *contra*, on behalf of the defendant, contended, that these words were to be construed as an EXCEPTION, not as a condition: the insurer is not to pay *any average at all*, unless in case of a *general calamity*. It is a general discharge from *all* average whatsoever, *except* in the *two* cases particularly specified: (which two specified cases are quite distinct and unconnected.)

The general contribution, and particular average have no connection with each other.

The stranding of the ship is considered as a *total* loss: and the insured may abandon.

He alledged, that the *premium* was paid in proportion to *his* construction; and *not* to Sir *Fletcher's*.

Sir *Fletcher*, in reply—With regard to the *premium*—The premium here taken was adequate to the common and ordinary premium: therefore so also ought the *risque* to be. Whereas, upon *their* construction, the underwriter would be upon a *better* and *more* advantageous foot, upon insuring perishable goods, than upon insuring bale goods, though the *premium* he receives on each is the *same*.

Here is a connexion between the average-loss in particular, and the general average: for, the *same* storm that occasioned the general average, was also the occasion of the *particular damage*.

[1555] Thus far indeed is true, but no further; “that we could have had no claim to any average at all, *unless* one of two specified cases had happened.” But as one of them *has* happened, we are thereby *let in* to claim *particular average*.

The case was ordered to stand over for the opinion of the court.

And on this 10th of July 1764—

Lord MANSFIELD delivered it, to the following effect.

After having stated the case, he repeated the observation and argument insisted upon by the counsel on the part of the plaintiffs, “that the warranty to be *free from average* ought only to take place, *if neither* of the two specified events *should* happen: but *if either* of the two specified events *should* happen, (if either the ship should be stranded, or any thing should happen which created a general average,) then the warranty to be free from average was thereby DISCHARGED.” For it was

argued and insisted upon, by them, that the words were in the nature of a **CONDITION**.

BUT they are *not* to be construed as a *condition*, in the *sense* that the counsel for the plaintiffs would have it understood.

1764.

WILSON

V.

SMITH.

POLICIES of insurance, according to their present form, are very irregular and confused: an *ambiguity* arises in them from their using words in *different* senses; particularly, in the use of this word *average*. [Moll. L. 2. C. 6. s. 4.]

It is used to signify a *contribution* to a *general loss*: and it is also used to signify a *particular partial loss*.

SIR HENRY SPELMAN, in his Glossary, under the word [Spel. 51.] *Averagium*, says, "it is detrimentum, quod vehendis mercibus accidit; ut fluxio vini, frumenti corruptio, mercium in tempestatibus ejectio: quibus adduntur vecturæ sumptus, & necessariæ aliæ impensæ. De averagiis mercium é navibus projectarum, distribuendis, vetus habetur statutum, non impressum, cujus exemplar apud me extat." (For my own part, I never met with that statute.)

Whether it be considered in *one*, or *other* of these senses, (c) it will not serve the turn of the plaintiffs, in the present case. For if it here signifies *contribution*, the insurer is to be free from contributing, unless where the contribution is *general*. If it signifies *loss*, then plainly it is warranted free from all *particular* losses. The insurer is *liable* to all losses arising from the ship being *stranded*, and in all cases where there is a *general average*: all other *partial* losses are *excluded* by the express terms of the policy. [1556]

THE LONDON Assurance Company, do, in all their policies, *leave out* this clause about the *ship's being stranded*; and only say, "free from average *unless general*." (d)

The word "*unless*" means the same as "*except*"; and is *not* to be construed as a **CONDITION**, in the *sense* that the counsel for the plaintiffs would put upon the word "*condition*."

The words "free from average *unless general*," can

(c) According to 1 *Magens*, page 10, at the end of the note 73.; and note that the form of the insurance in this case, only expressed what was always agreeable to the custom, in many other countries, and ever since 1749, in some instances at least, to the forms of insurances here.

(d) This is contrary to 1 *Magens*, page 10, at the end of the note there, where the practice of the London Insurance Company is said to be contrary to what is here mentioned.

1764. never mean to leave the insurers liable to any *particular* average.

WILSON v. SMITH. It is clear that the plaintiffs *ought not* to recover; and that the judgment ought to be for the defendant.

JUDGMENT for the DEFENDANT.

Wednes. 14th
July, 1764.

[S.C. 1 Black-
482]

HARKER et al. *versus* BIRKBECK et al.

Trespass and
notcase will lie
for encroach-
ing on a lead
mine, though
the plaintiff
has no pro-
perty in the
soil above the
mine, but on-
ly a liberty of
digging.

[See post.
1824, a.
Co. Lit. 164. b.
and post.
2832.]

THIS was a special case from the last *Lent*-assizes for the county of York. The verdict was given for the plaintiffs: but

There was a rule, by consent, "that the verdict should be subject to the opinion of this court; and if that opinion should be for the plaintiffs, then they were to be at liberty to proceed upon it; if for the defendants, then the verdict to be vacated, and instead thereof, a nonsuit returned."

It was an action of trespass upon the case; wherein the plaintiffs declare, that whereas they were and still are lawfully intitled to and ought to have and enjoy the sole LIBERTY AND PRIVILEGE of digging for, getting and raising lead ore, and taking the benefit thereof, within a certain place or plat of ground lying and being in *Whitaside*, east of the old field called *Grena Field*, bounded, &c. as is particularly stated in the declaration; the defendants well knowing the premises, but intending to injure the plaintiffs in this behalf, and to deprive them of all the benefit and advantage of GETTING AND RAISING LEAD AND LEAD-ORE within the said place or plat of ground within the limits above described, and whilst the said plaintiffs were so lawfully intitled to get lead-ore there as aforesaid, did sink for, raise and get a great quantity (to wit 100 ton) of lead-ore within the said place or plat of ground within the limits above described, of the value of 200l. and took and carried away the same, and converted and disposed thereof to their own use: whereby the said plaintiffs were DEPRIVED OF THE BENEFIT AND ADVANTAGE which they might and otherwise would have made of their said LIBERTY and PRIVILEGE.

[1557]

There was another count, containing the like recital, and charging the like facts of sinking for, raising and getting a great quantity of lead-ore within the said plat and within the limits above described; but omitting to charge taking, carrying away and converting it to their own use; which count lays this as an *interruption* to the plaintiffs, in the exercise of their said *liberty and privilege* there, of digging for, getting and raising lead-ore; and thereby depriving them of the benefit and advantage which they might and otherwise would have made of their said *liberty and privilege*.

The defendants pleaded the general issue, "not guilty;" and thereupon issue was joined.

The case stated and reserved for the opinion of this court was—

That *Mrs. Moore*, as executrix of her husband, was solely intitled to the mines and veins of lead and lead-ore within the limits mentioned in the declaration, for a term of years yet to come. That she had no interest in the soil, but for the purposes of digging and searching for lead and lead-ore and working the said mines.

That she employed one *Rosewarne*, as her agent: and that he, on her behalf, and the plaintiff *Harker*, on behalf of himself and partners, signed a writing upon plain paper without stamps, in the following words—"16th

"June 1761. Memorandum—" *Mr. Thomas Rosewarne*, [4 Leon. 147.
Co. Lit. 164. b.
10 Vin. 292.
pl. 9.
Qu. Bull. 177.
Ld. Raym.
1418.
2 Bl. Rep.
979.]
"agent to *Mrs. Frances Moore*, doth let or set to *John Harker and partners*, to raise lead-ore in a plat of ground lying and being in *Whitaside*, east of the old field called *Grena-hill*. This plat of ground begins at a gill called or known by the name of *Long Gill*; and from *Long Gill Head* to *Pickestone Rigg*, which is the south-west boundary adjoining to the Duke of *Bolton*: the north-east boundary of this plat of ground begins at a gill at the west end of *Birks* pasture, known by the name of *Will Anton Gill Head*; and from *Will Anton Gill Head*, to a boundary called or known by the name of *High Barle*, adjoining to the Duke of *Bolton*; which is the north-east boundary of this plat of ground. *John Harker and partners* do agree to pay to *Mrs. Frances Moore*, or her agent, every sixth pig of lead, both at the ore-hearth and slag-hearth: for which, *Mr. Thomas Rosewarne* doth agree to let the above partnership have the said ground the length of *Mrs. Moore's* lease she now has from the crown: *Mrs. Moore* to find the above partnership a smelting-mill in good repair, to smelt the ore the partnership shall raise. *Mr. Thomas Rosewarne* or any other agent *Mrs. Moore* shall appoint, shall have free liberty or leave to inspect the said workings, whenever they please. The above partners not to cease working the above-mentioned ground for the space of two months; unless hindered by water or some other unavoidable accident. *Mrs. Moore* is to carry one eighth part of this bargain."

It further appeared, that the plaintiffs have worked for and got lead-ore there; and that the defendants had also dug, within the limits mentioned in the declaration, for several times, within the time mentioned in the declaration, to search for, and thereout had RAISED lead-ore: upon which the plaintiffs had brought this action against

1764.

HARKER
v.

BIRKBECK.

[1558]

1764.

HARKER

v.

BIRKBECK.

the defendants, for *disturbing* the plaintiffs in their *PRI-VILEGE under the said writing*.

The above *writing* was produced and read in evidence, WITHOUT SEAL or STAMP; being the *usual manner* of making agreements for lead-mines there.

The defendants insisted, "that the *present action* can not be maintained: that if any action could be maintained in this case, it should have been trespass *quare clausum fregit*."

A verdict was given for the plaintiffs, with a *shilling* damage; subject to the opinion of the court upon the following questions; *viz.*

1st. Whether the *above action* can be *maintained*.

2d. Whether the writing, *not being stamp*, could be *given in evidence*, to prove the plaintiff's right.

This case was first argued on *Friday* the 18th of *May* last, by Mr. *Clayton*, on behalf of the defendants, and Mr. *Walker*, on behalf of the plaintiffs; and again, on *Tuesday* the 26th of *June*, by Mr. *Morton* for the plaintiffs, and Mr. *Wedderburne* for the defendants.

Mr. *Clayton*, for the defendants—

[1559] 1st Point—The distinction between trespass *quare clausum fregit*, and trespass *upon the case*, is, that where the act is itself *immediately* injurious to the plaintiff, he must bring trespass: but where it is so only in *consequence*, case is the proper remedy. Here, the plaintiffs were in *possession*; and if any injury was done them, it was an *immediate* injury to their possession. Therefore they ought to have brought TRESPASS, and not *case*.

* For this distinction, see

2 Ld. Raym.

1402. *Reynolds v.*

Clarke; and

in *Haward v.*

Banks, esq.

Mich.

1760. 1 G. 3.

B. R. ante,

p. 1114.

[*Buller, 79.*]

[3 Wils 408.]

2d Point—The plaintiffs could not claim any title, (either as lessees, or grantees or assignees,) but by *deed*; and this deed ought to have been STAMP; and *not being stamp* at the time it was produced could *not be received as evidence*. 5 *W. & M. c.* 21. § 3. 9, 10 *W. & M. c.* 25. § 30. 12 *Ann. c.* 9. § 21. 30 *G. 2. c.* 19. § 1.

Mr. *Walker*, for the plaintiffs—

1st Point—He admitted the distinction; but argued, that the injury here was *consequential* only; and therefore case would lie. And we do not bring the action for breaking the soil, but for what was done in *consequence* of it. We could not bring trespass for breaking the soil: for, that is the *lord's*.

2d Point—This is only a *memorandum*; not a lease: it is, at most, but a *licence*. And it is not necessary that it should be *stamp*.

Mr. *Clayton*, in reply—

1st Point—The entering, digging and carrying away is an *immediate* trespass

2d. This is a *lease*, though not under hand and seal: a lease may be good, *without* those circumstances.

Lord MANSFIELD—The whole question will turn upon what the agreement *is*: that will go both to the *species* of action, and to the necessity of *stamping*. 1764.

Uterius Concilium.

Upon the second argument, Mr. *Morton*, for the plaintiffs insisted— HARKER v. BIRKBECK.

1st. That in fact, *no such possession* is stated to be in the plaintiffs, as can support them in bringing trespass *vi et armis*. For, the *soil*, was *not in them*, but in the lessor or grantor of Mrs. *Moore*: and Mrs. *Moore's* own grant to the plaintiffs is *no lease*, but only a *licence* to dig for lead-ore: the plaintiffs themselves would have been trespassers, if they had offered to meddle with the soil for any *other purpose* than that of digging for lead-ore. Therefore the plaintiffs could not have maintained an action of *trespass for breaking the soil*; nor for *entering their mine*, when it was not yet a mine at all: neither could they have brought trespass *de bonis asportatis* for taking and carrying away *their lead*. Mrs. *Moore* could not have distrained it for the rent reserved, if it had been left upon the place: neither could it have been taken in execution as goods and chattels of these persons who had this licence to search for it, in case there had been an execution against them. If an action of trespass would lie for the plaintiffs, in the present case, the defendants would be liable to *two* actions of trespass, for *one* single trespass only: for, Mrs. *Moore* might certainly bring trespass against them, as owner of the soil; or, if not Mrs. *Moore*, the person who is by law owner of the soil. (e) [1560]

(e) In page 1557, it is stated that she was intitled to the mines of lead, but had no interest but for "digging, " searching for and working the said mines," therefore it ought to be (*as owner of the lead mines*;) and as mines may be, and it appears from what is before stated, that in this case the lead mines in question were, a distinct property from the surface or the rest of the soil; the consequence is that either the plaintiff as owner and in possession of the mines or the general owner of the estate, or as such owner is sometimes called the owner of the surface, might in respect of their several interests maintain an action for trespass against any third person or stranger for digging lead-ore; for such digging and taking lead, is clearly a trespass to the owner of the lead-ore, and the digging at all or coming on the estate, is also a trespass to the owner of the estate, if it be not a digging for lead, by the person having the property of the lead mines; for when the same act is injurious to several persons, each person may have an action; as in 3 *Lev.* 209. where there

1764.
HARKER
v.
BIRKBECK.

However, it has never been determined, "that *case will* " *never* lie, where *trespass will* lie." The former species of action is not excluded from *every* instance in which trespass *vi et armis* may be brought: on the contrary, the plaintiff may in *many* cases bring *either* one or the other at his election.

In *Style 99. Roll* held, that for rescuing a prisoner out of the plaintiff's custody, he may have an action upon the case, or *trespass vi et armis*, at his election.

In 1 *Ld. Raym.* 187. *Shapcott v. Mugford*, against a parson for not taking away his tithes—the court said, that "though it should be admitted that the plaintiff *might* " *have had trespass*, yet that was no argument; because, "in many cases, the *law allows a double remedy*." The case of *Thornton and Austen* was there cited and approved; and that of *Stodden v. Harvey*, in 2 *Cro.* 204. was likewise cited and considered: and yet they held as above.

He likewise cited the cases of *Pitts v. Gaince* and *Foresight*, in 1 *Salk.* 10. and *Reynolds v. Clarke*, in 2 *Ld. Raym.* 1399.

[1561] And concluded this point with comparing the property of the present plaintiffs to those uncertain properties which a man may have in the *prima tonsura* of grass, or in an inheritance depending upon the *future casting* of a lot; and other cases where trespass cannot be brought *till* the thing is severed.

2d. As to the STAMP—He denied this writing to be such a sort of instrument as *requires* a stamp. It is not a *lease*, nor an *indenture*, nor a *deed poll*: it is only a MEMORANDUM, an *agreement executory*, about a mere *contingent* interest depending on the will of the plaintiffs, and their election whether they would or would not dig for this lead-ore.

Mr. *Wedderburn*, *contra*, for the defendants,

First point—1st. The plaintiffs certainly claim under a LEASE from Mrs. *Moore*, of these *mines*. She was actual lessee of them, from the crown: and the plaintiffs are her lessees of them. There is no technical form of words necessary to constitute a *lease*. However, here are the technical terms "*let or set*" actually used; and no essential form of a lease is wanting: an *ejectment* would have lain upon it. This is nothing like a contract with adventurers; for here was a mine existing, and the rent made payable immediately. A mine is demisable, distinct from any right to the land. This

[Co Lit 164 b.
165. a.]

is an instance that case may be maintained by him in reversion, and trespass by the tenant in possession for the same trespass.

must be more than a licence. A licence is *personal*: this interest is *transmissible*. Here is a *rent* reserved; and the lessees are bound to *continue* working the mine, if once they begin at all to do so.

2dly. The plaintiffs were *in possession*. It is expressly stated "that they *have worked for and got lead-ore there.*"

3dly. The injury here complained of, is *immediate*, and not consequential. The act of the defendants which *immediately* affects the plaintiffs is "*digging for the lead-ore within their limits and thereout raising it.*" The loss the plaintiffs have sustained, is the *value of the lead*; and there is *no other* consequence whatsoever. *Trespass* certainly lies for this lead, after the plaintiffs had *reduced it into possession*; and so it is in cases of *prima tonsura*, and *herbage*. It is true that *both* actions may lie, where there is *both* an immediate *and also* a consequential injury done; which was the nature of the cases cited by Mr. *Morton*: and therefore the plaintiffs therein, being intitled to *both* actions, must have their *election* to proceed in *either*. The cases of *Thornton v. Austen*, cited in 1 *Ld. Raym.* 188. is exactly similar to the present: and that of *Hills and Clerk*, there also cited, was the same point, and determined upon the same reason. And there is a *reason* for preserving a proper distinction of actions. The statutes concerning *costs* are, of themselves, sufficient to render this necessary: and the judgments are also different; for, in the one, there is a fine to the king; in the other, none. *This* ought to be *trespass*, and not case; because the injury is *determined* by the act itself; and therefore it is not like cases of commoners, or estovers, and profits a prendre. And as to the defendants being liable to *two* actions for the *same* trespass, if an action of trespass *vi et armis* would lie:—they will in *either* case be liable to *two* actions: and it is indifferent to them, *who* are the *plaintiffs* in the two actions.

4thly. The distinction is settled "that if the plaintiffs might and ought to have brought trespass, case *will not* lie." (f)

Second Point—This is a *LEASE*, as is before shewn; and therefore ought to be *stampt*. He cited two cases at *nisi prius*, viz. *Hall v. Down*, at *Easter* or after *Hilary* sittings 1735, before *Ld. Hardwicke*; and *S.P. Tr.* 12 *G.1.* before *Ld. Raymond*, *Moor v. Evelyn*, *Tr.* 12 *G.1.* *B.R.*

THE COURT having observed, that though Mr. *Wedderburn* had called this instrument a *LEASE*, and Mr.

1764.

HARKER
v.

BIRKBECK.

[1562]

(f) This makes it a trifling or no point.

1764.
HARKER
V.
BIRKBECK.

Morton had called it only a MEMORANDUM OF agreement executory, yet it seemed rather to be an ASSIGNMENT of Mrs. Moore's whole interest, for and during her whole time: and that if it be a lease, yet it is for the whole of her term; (g) and that the question would therefore be, "whether it is not necessary that such an assignment should be stampd," and "whether such an assignment must not be *by deed*;" especially where it is an assignment of interest under a lease from the crown, which is upon record—(h)

Mr. Morton, in reply, took notice that Mrs. Moore might have (for aught that appears to the contrary,) other interests in the soil, under her lease from the crown, besides this right of digging for lead-ore: she might have had such an interest in *this right* "to dig for lead-ore," as would pass without a deed, and

(g) This is a contradiction in terms, for a lease for the whole term is an assignment and not a lease. Lord Raym. 99.

(h) The supposition that the memorandum should be construed either as an agreement or as a declaration of trust, seems not warranted by the words or the intention of the instrument; for the words of it are apt words for a lease, and are in the present tense, *viz.* "doth let or set," and there is not any intention expressed, or that can be reasonably inferred that this memorandum was to be preparatory to a future lease; so that the instrument was in terms a lease, but in legal operation an assignment: for where a lessee makes a lease for the whole, it amounts in law to an assignment. Lord Raymond, 99.

A lessee for years might also before the statute of frauds have assigned his term by parol, and may now assign it by writing signed by him, though it be not a deed, as well as by deed. Lord Raym. 921. But in this case the thing leased seems to lie in grant. 10 Vin. 292. pl. 9. and if so then it seems that the lease could not be assigned but by deed, Br. T. 2. Grants, pl. 38, and then by conforming the general expressions by Lord Mansfield to the particular case before him, what he is here reported to have said that an assignment must be *by deed*, may be right. But qu. whether it can be in a court of law from thence inferred that it shall operate as an agreement or a trust; or whether it ought not in a court of law to be considered as void for others? And qu. if all assignments not by deed, which ought to be so must not be considered in the same light? Which seems too much for a court of law to do.

though the *original grant* from the crown must be under the great seal, yet an *uncertain interest arising under it*, may be conveyed and assigned by note or writing under the party's *hand*; 29 Car. 3. c. 5. § 3.

1764.
HARKER
V.
BIRKBECK.

The plaintiffs here had no such *possession* as that an ejectment would lie upon it; they had no more than an *interest*, which they had liberty to pursue or to desert, at their election.

The injury done to them is the *finding and taking away* the lead-ore: the *digging* does not affect them, as they were *not* owners of the soil. Therefore it is a *consequential* injury.

Lord MANSFIELD observed a circumstance that had not been mentioned by the counsel on either side; viz. that Mrs. Moore appears to be * *herself* a partner for one-eighth of the lead: and she can neither let nor assign to herself. (i) So that the *legal estate continues in her*; and they come in as *equitable* partners. [1363]

* Vide ante, 1538.

Mr. Justice WILMOT—She lets to seven persons and herself.

THE COURT having taken time to consider this case—

LORD MANSFIELD now delivered their resolution, [See 1 East. 246.] in favour of the defendants.

First—As to the *nature of the action*.—It appears that the plaintiffs were *in possession* of the mine: for, they had actually *wrought* it; and were *not to cease working* it, unless hindered by some unavoidable accident; and Mrs. Moore's agents were to have leave to inspect their workings. It is clear therefore, that they were in *possession* of it. And the injury done is a *trespass*. Therefore the *proper action* is an action of TRESPASS. Whoever is *in possession*, may maintain an action of trespass, against a *wrong-doer to his possession*.

If there be a doubt about the *extent* of his possession, or *what part* he is in possession of, a *writing* relating thereto may be given in evidence, in maintenance of his action of trespass for a wrong done to *that part* which he is in possession of. The *title* may be material to be given in evidence, in order to maintain his possession *as to that part*, and to ascertain the *extent* of it. Therefore *this* * *V. post.* *writing* (whatever it might be called) might be proper to be given in evidence, in order to support the action. But *Beck, ex dimiss. Fry v. Phillips, 7th Feb. 1772.* it is *no LEASE*; because nothing is *reserved* to Mrs. Moore. (k) B. R.

(i) S. P. 12 Mod. 688. 1 Rol. Abr. 827. (A.) 1. n. or 10 Vin. 201. (A.) 8 Mod. 304. acc.

(k) This is no reasoning at all, for a reservation is not

1764.
HARKER
v.
BIRKBECK.

It is *not* an assignment: because it is not by *deed*: an assignment must be by *deed*. It rather seems that the legal property continued in Mrs. Moore. So that it seems to be either an agreement for an assignment, or else a declaration of trust; (h) an equitable interest, leaving the legal property in Mrs. Moore. In a court of equity, the plaintiffs would be considered as being in possession from the time of the agreement: and here it is stated, in effect, "that they *were* in possession." This shews that the action ought to have been an action of TRESPASS. And in an action of trespass, *this writing* might have been given in evidence: though, if it had been a lease, it could not have been given in evidence without being stamped.

[1564]

We are all clear, that the action ought to have been TRESPASS.

Let the POSTEA therefore be delivered to the defendants: and let them be at liberty to sign a nonsuit.

[S. C. 1 Bl.
Rep. 480.]

Venue changed where apprehension of a partial trial.

* Mr. J. Denison was absent; and had been so, during this whole term.

MYLOCK *versus* SALADINE.

ON shewing cause why the venue should not be changed from the city of Chester to the county at large—

Lord MANSFIELD, * Mr. Justice WILMOT, and Mr. Justice YATES were all of opinion, that in transitory actions, the court ought to change the venue, when it appears upon circumstances laid before them, that there

essential to a lease: upon this there is a case in point as to a feoffment in *Perk. Sect. 203.* and there is no difference as to this point between a feoffment and a lease at common law: so that *Perk. Sect. 203.* is in effect in point. *Shep. 267.* is also expressly to the point, and the same may be plainly inferred from *Lit. sec. 58.* and many other authorities, that a reservation of rent is not part of the definition of a lease.

(l) Qu. Whether a lease or any conveyance, or grant at common law, made to the grantor and others, would not at law be a good lease or grant for the whole, to the others; like a grant to several, where some are capable and agree to it, and others are incapable or disagree; in which case if the grant be joint, the whole will vest in those who are capable, and agree to it: and in common cases there will be no trust; but this being the case of partners there would be clearly a trust for the grantor for the like share in this as in the other partnership effects; and qu. whether in all cases of a conveyance at common law to the grantor and others, there shall not be a trust, which it will be for equity to aid?

is a probable ground to apprehend a fair, impartial or at least a *satisfactory* trial can not be had.

1764.

Accordingly, in this case there having been a trial in the city; and a new trial ordered because the verdict was against the weight of the evidence, and the damages excessive (if it had been warranted by the evidence;) and there being a strong proof given by affidavits, of a general *prejudice* in the city; they made the

MYLOCK
v.
SALADIN.

RULE ABSOLUTE.

REX *versus* PHILIPPS, LUCAS, and GIBSON.

MR. Attorney General having yesterday moved the court for *leave* (in the ordinary form of these motions) to exhibit an *information* against several persons for a most gross misdemeanor in attempting to influence the jury returned to try Mr. *Wilkes's* cause, by sending them several pamphlets and inflammatory papers; and actually preventing Mr. *Wood* of *Littleton*, and Mr. *Cli-therow* of *Brentford*, two of those special jurors who had been before summoned, from appearing, by sending an express to them in the middle of the night preceding the day of the trial, with a fictitious letter (signed "sum-
" moning bailiff,") acquainting them " that the trial was
" put off," (when in truth it was not put off, but did then come on—)

No information can be granted at the instance of the crown, the attorney-general having power to issue the same *ex officio*.

Lord MANSFIELD declared, that the court would never grant an information upon the application of the attorney general, in cases prosecuted by the crown; * because the attorney general has a right himself, *ex officio*, to exhibit one: and he may, if he thinks proper, summon the parties, to shew cause " why it should not be exhibited," before he signs it. This is *not* a case within the act of 4, 5 IV. & M. c. 18. " to prevent malicious informations in the court of King's Bench." And therefore his lordship told Mr. Attorney General, " that he must use
" his own discretion."

[1565]
* v. post.
p. 5089, 5090.
Rex v. Phillips, 30th May, 1767, accord.

Whereupon Mr. Attorney changed his motion, and prayed a rule to shew cause why an *attachment* should not issue against *Lucas* and *Gibson* (who were two of Mr. *Philipps's* clerks or agents,) upon the affidavits, which charged them with being concerned in this mal-conduct: which rule he obtained.

Against this rule for an attachment, they now shewed cause. The facts were certain: " whether the persons
" complained of were concerned in them," was the only doubt. And by their affidavits, they exculpated themselves, to the satisfaction of the court: who therefore

DISCHARGED THE RULE

The end of Trinity Term 1764. 4 G. 3.

VOL. III.

X

5 GEO. III. B. R. 1764.

13
dash
240.
Wednes. 7th
Nov. 1764.

Qu. As to
special bail on
error in par-
liament upon
judgment in
debt, upon re-
cognizance in
error is re-
quisite.

V. ante, 1545.
Biddleson v.
Whytel.

TRINDER *versus* WATSON and another.

THIS was a writ of error returnable in *parliament*, brought upon a judgment in this court in an action in debt upon a *recognizance in error*. And the plaintiff in error in parliament *not* having entered into a recognizance pursuant to 3 J. 1. c. 8. the defendant in the said writ of error moved for and obtained a rule for the said plaintiff in error to shew cause why the defendant in error should not be at liberty to *sue out execution*, for want of such recognizance.

Mr. *Wallace* shewed cause, for the plaintiff in error; and insisted, that 3 J. 1. c. 8. does not require bail on bringing *such* a writ of error as this is. For, it only requires bail upon writs of error for reversing judgments in any action or bill of debt upon any *single bond* for debt, or upon any *obligation* with condition for the *payment of money only*, or upon any action or bill of debt for *rent*, or upon any *contract*: whereas *this* writ is for reversing a judgment in an action of debt upon a *recognizance*; which judgment is of a *superior* nature to *any* of the judgments *specified* in the statute. And it is an established rule, "that when a statute begins with specifying *inferior* means, instances, or persons; no means, instances, or persons of *superior* nature or kind, shall be included." 2 Rep. 46 b. Archbishop of *Canterbury's* case. Consequently, a writ of error to reverse a judgment in an action of *debt upon a recognizance* is *not within* this statute. This rule was applied to cases arising on this very statute; in *Taylor v. Baker*, 3 Keble 802. and in *Biddleson v. Whytel*, last term.* In *Trin. 18, 19 G. 2. C. B. Barnes's* notes, vol. 2. p. 161. "After an award of execution, against bail on a recognizance in error, a writ of error was brought by the bail, as to such award of execution. The plaintiff moved for leave to take out execution, for want of bail on the writ of error brought by the bail; and obtained

* V. ante,
1545.

[And 1 Bosan.
249.]

" a rule to shew cause: which rule was *discharged*; no *bail*, in *this* case, being *required*." So, in the present case, the action being brought *upon a recognizance in error*, as that was; and this being a like rule with that; it ought to be discharged, as that was.

1764.

TRINDER
V.
WATSON.

Sir *Fletcher Norton*, (attorney general) *contra*, for the defendants in *error* argued that this recognizance in error, upon which the present action was brought, was an *obligation with condition for the payment of money only*: and therefore, by the *express words* of this statute, " no execution shall be stayed or delayed upon any writ of error, sued for reversing the judgment therein without putting in bail." The statute does not confine it to bonds; but speaks of "*obligations with condition for the payment of money only*." And this is an *obligation so conditioned*: it is conditioned, " to prosecute with effect, and to pay the debt, damages and costs upon the former judgment, together with costs and damages for the delay of execution." It is indeed conditioned to be defeazanced, *in case* the writ of error *had been* prosecuted with effect. But this writ of error *has not been* prosecuted with effect: it has been *nonprosecuted* for want of prosecution. And the recognizance *thereby* became an obligation conditioned for payment of money only. It was *eventually* so, from the first: and at the time when the action was brought, it was *actually* become so. It is true, that it was not an obligation " to pay money, in all events." But in the event that *has happened only money is to be paid*: there is no alternative, " to surrender the principal." It is like the cases of writs of error brought upon judgments in actions on bottom-rece-bonds. On these bonds, the money is not absolutely payable in all events; but if the ship comes safe home, it *thereby becomes an obligation for payment of money only*; and then the court will require bail on bringing a writ of error. *Pitt v. Coney*, 1 Sir J. S. 476. M. 8 G. 1. B. R. "*per curiam*—The contingency having happened, this is now, in every respect, a bond for the payment of money only: and therefore there must be bail." As to the case of *Bidleson v. Whytel*, it went off, he said, upon another foot. (See it, ante 1545.) And as to the case in *Barnes* 161, he said, it could not have been determined upon the *reason there given*; viz. " that no bail was in that case required."

Lord Mansfield said, he should have thought " that these cases ought to be *liberally construed*," as they arise upon remedial laws. But in that case of *Bidleson v. Whytel*, it appeared " that the determinations had been otherwise:" and we must not depart from settled

Tha 1764, 1 -
but see Barnes
746. 1764 p 24

1764.
TRINDER
v.
WATSON.

determinations. In that case, the weight of authorities prevailed.

Mr. Justice WILMOT expressed himself to the like effect.

THE COURT ordered it to stand over, to inquire into the practice. And on the last day of the term, Mr. Attorney General moved to enlarge the rule: but the rule made upon that motion was never drawn up; nor does any thing further appear to have been done in consequence of it. So that the defendant in error probably gave up his motion, "to be at liberty to sue out execution."

Tuesday, 15th
Nov. 1764.

[S. C. 1 Bl.
517.]

Bond in consideration of seduction and future cohabitation void.

WALKER *versus* PERKINS, ADMINISTRATOR.

SARAH WALKER brought an action upon a bond. Upon oyer being prayed, it appeared to be a bond from William Perkins the intestate, to the plaintiff, in a penalty. It recites, that whereas the above bound William Perkins (the intestate) and Sarah Walker had agreed to live together, therefore he had agreed to find her meat, drink, washing, and lodging, &c. and to leave her an annuity of 60l. a year, if he quitted her, or she outlived him: and if they had any child, he was to take care of and provide for it. But if she should leave him, or go to another man, then he should not be obliged to provide for her any longer, or to leave her any annuity.

The defendant pleaded, that this was an agreement between the plaintiff and his intestate, "to live together in a state of fornication:" and that such a bond made in pursuance and support of an agreement "to live together in fornication," is void in law.

In reply to this plea, the plaintiff alledged, that she was a virgin, and was seduced by the intestate; and in consideration thereof, this bond was given to her by the intestate; and that it was *premium pudicitie*.

To this replication the defendant demurred.

Mr. Blackstone, for the plaintiff, observed that the condition consists of two parts; one, "to live together in a state of debauchery;" the other, "to leave her an annuity:" the former part whereof, is void; the latter good. That suit may therefore well be upon the virtuous part, the paying her the annuity. For, it is agreed, in the case of *Chesman et Ux v. Nainby*, 13 G. 1. B. R. 2 Lord Raymond 1459, and 2 Sir J. S. 744. that the position laid down in *Hobart* 14. (in the case of *Norton v. Simmes*) "that the common law, having made that void that is against law, lets the rest stand;" and that where a bond is conditioned to do some things agreeable to common law, and others disagreeable to it; the breach may be assigned upon that part which is good.

[See Eq. Abr.
87. Cas. 4, 5.
5 Ves. 289]

[1569]

And here *premium pudicitie* is a sufficient consideration.

Lord MANSFIELD—It is the price of prostitution, *premium prostitutionis*: for if she becomes virtuous, she is to lose the annuity. It appears clearly, upon the condition, that the bond is *illegal and void*.

JUDGMENT for the DEFENDANT.

REX versus BAPTIST REBORN.

ACTION on 26 G. 2. c. 21. § 3. for a forfeiture of 200l. for having unsealed wrought silks found in his custody.

Upon shewing cause why the defendant should not be discharged on *common bail*, Mr. *Wallace* for the plaintiff, said, it had been objected "that this was a popular action"

But he answered, that the 8th section of this act of 26 G. 2. c. 21. (on which this action was brought) expressly authorizes to hold to *special bail*: it gives a *capias* in the first process, specifying the sum of the penalty sued for; and directs "that the defendant shall be obliged to give sufficient bail, &c."

Mr. *Stowe*, for the defendant, objected, that though the act gives a *capias*, &c. yet it is not positively sworn in the plaintiff's affidavit, "that the defendant has committed the offence:" it is only, "that he has cause of action against him for 200l. forfeited by him for so much unsealed silk, &c. found in his custody." This is making the plaintiff a judge of the offence. It ought to be positive, "that the defendant had committed the offence described in the act of parliament."

Cur. It is positive enough: he swears "that he had [1 Durn. 705.] cause of action against him for 200l. forfeited by him &c."

The act does not require an affidavit at all.

RULE DISCHARGED.

EVANS, ex diemiss' BROOKE Bart. versus ASTLEY, Esq. et al.

Friday, 16th Nov. 1764.

THIS was a special verdict in ejectment, of lands in several parishes in the county of *Chester*, found at the summer-assizes for that county in 1762.

It is stated, that Sir *Samuel Daniel* was, on the 19th of February 1762, seized of the premises in question; and all and every other son of A. without naming any estate, remainder for want of such issue to B. in tail male; the after born sons of A. take an estate in tail male. [See 4 Durn. 515. 1 Broom. 254, 261. n. 1 Brown, 349, 350. 3 Durn. 85. 4 Durn. 49.]

[S. C. 1 Bl. 499. 521.]

A devise to A's three sons in tail male, successively, remainder to

1764.

WALKER v.

PERKINS.

Thurs. 15th Nov 1764.

Special bail requisite on a popular action.

[1570]

1764.
EVANS
ex dimiss.
BROOKE
v.
ASILEY.

being so seised, he, on that day, made his will, duly attested, and written with his own hand: in which will are contained the following clauses and provisions; viz.—“ And whereas I am at this time seised of a fee-simple estate “ in the county palatine of *Chester*, in the several manors “ and townships of *Over-Talby, &c. &c.* Now, for preventing and quieting all disputes and controversies “ touching and concerning who shall hold and enjoy “ my said estate if I die without issue male or female, (a) “ I do, by this my last will and testament in writing, “ under my own hand and seal and published by me in the “ presence of the witnesses whose names are here written, “ give, grant, limit, devise, and appoint, all my said “ manors, lands, and tenements with their appurtenances, in *Over-Talby, &c. &c.* with their several and respective rights, members, and appurtenances, in the “ said county of *Chester*, and all other manors, &c. &c. “ and hereditaments whatsoever, of what kind or nature “ soever, wherein I have any manner of estate, situate, “ lying and being in the county palatine of *Chester*, unto “ *Samuel Duckenfield* my godson and son of *Charles “ Duckenfield* of *Mobberley* in the county of *Chester* esq. “ during his natural life, and the heirs male of his body “ lawfully to be begotten; and for want of such issue, “ to *Charles Duckenfield*, another of the sons of the said “ *Charles Duckenfield* esq. during his natural life, and to “ the heirs male of his body lawfully to be begotten; and “ for want of such issue, to *John Duckenfield*, another “ of the sons of the said *Charles Duckenfield* esq. during “ his natural life, and to the heirs male of his body, law- “ fully to be begotten; and for want of such issue, then “ to every son and sons of the said *Charles Duckenfield* esq. “ which shall be begotten on the body of *Sarah* his now “ wife: and for want of such issue, then to *William Hulton* “ of the city of *Chester* during his natural life, and the “ heirs male of his body lawfully to be begotten; and for “ want of such issue, then to *Samuel Goldston*, of *East “ Ham* in the county of *Essex*, my godson, for and during “ his natural life, and the heirs male of his body law- “ fully to be begotten; and for want of such issue, then “ to *James Goldston*, brother of the said *Samuel Goldston*, “ during his natural life, and the heirs male of his body “ lawfully to be begotten; and for want of such issue, “ to the right heirs of the said *Sir Samuel Daniel* for “ ever.”

[Vide post.
1874, 1877.]

“ Provided always nevertheless, and my express will “ and mind is, and I do hereby declare, that the estate

“ hereby granted, devised and limited, of the premises, to the said *Samuel Duckenfield* and others as aforesaid, shall be upon this express condition, that if the uses and estates so granted, devised and limited to him or them and their descendants shall come to him or them and be in possession, that then and thereupon he and they and their descendants, to whom the premises shall come and be in possession, shall procure an act of parliament to be past in the first or second sessions of parliament, by virtue whereof he and they shall take and use my sur-name, and bear in chief the arms of the *Daniels of Over-Tabley in Cheshire*; where my family hath been very ancient: or, otherwise, the uses and estates so granted, devised and limited to them who shall refuse or neglect to take and use my name and arms in chief as aforesaid, to determine.”

“ I give all my books (except what given to my wife,) both at *Tabley and Hollis-Street*, in the county of *Middlesex* and parish of *St. Mary le bon*, and all my family-pictures, and all other pictures (except what is given to my wife) at *Tabley and Borton*, and all statues, clocks and bells, brewing-tubs, and brewing-vessels, and all vessels belonging to the cellar at *Tabley*, and all goods at *Tabley* after my wife's decease; and all the interest, title and remainder of years which shall be unexpired at my death, which I have in the lease from the dean and chapter of *Christ-church in Oxford*, of the tithes of *Over-Tabley* and the moiety of the tithes of the parish of *Rotherstone* (being small tithes) in the county of *Chester*, unto *Samuel Duckenfield* aforesaid; and if he happen to die, then to the next in remainder, or any other that by this my will shall enjoy the estate hereby granted and devised: and my desire is, that my executors shall renew the said lease at every seven years end; that it may be kept in the possession of the family at *Over-Tabley*.”

“ Item, I give and bequeath my silver punch-bowl, and silver ladle, and marrow-scoop, and the two large silver decanters which were made of the silver of my two trumpets which I had when major of the horse in *Ireland* in 1690 and 1691, to the said *Samuel Duckenfield*; or, if he happens to die, to the next in remainder, or to any other that by this my will shall enjoy the estate hereby granted; and desire my executor to keep them for the family, as abovesaid.”

N. B. There was a power, given to make leases; and also a power, to make jointures to the amount of 200*l.* per annum.

Samuel, John, and Charles Duckenfield, the three sons

1764.

EVANS

ex dimissa

BROOKE

V.

ASTLEY.

[1572]

1704.
 Evans
 ex officio
 BROOKS
 v.
 ASLEIGH

of *Charles Duckenfield of Moberley*, all died without issue.

But *Charles Duckenfield of Moberley* had a fourth son, named *William*, born after the date of the will; who became seised, and took the name and arms of *Daniel*, according to the directions of the will; and suffered a recovery, and then made his will; (under which will, the defendants claim.)

William Hulton, and *Samuel* and *James Goldston*, (the other remainder-men,) died without issue male.

The lessor of the plaintiff claims as one of the right heirs of the testator *Sir Samuel Daniel*: viz. one moiety of the estate under a co-heiress; all the prior remainder-men being dead without issue.

The question was "what estate *Sir William Duckenfield Daniel* (the fourth son of *Charles Duckenfield of Moberley*, esq;) took, under this will of *Sir William Daniel*."

This case was argued on Tuesday the 3d, and Friday the 5th of July last, by Mr. *Blackstone*, on behalf of the lessor of the plaintiff; and Mr. *Eliab Harvey*, on behalf of the defendants.

Mr. *Blackstone* contended, that he took an estate for life only.

He began with laying down some general rules and principles concerning devises of land. They must be expounded agreeably to the intention of the testator, if such intention be not repugnant to the rules of law: and the intention of the testator must be collected from the whole will taken together. An estate tail shall not be raised by implication, unless it be a necessary one: a conjectural or merely probable implication is not sufficient ground for disinheriting an heir at law. If the testator's intention is dubious, the construction shall be in favour of the heir at law.

Upon this whole will taken together, there is no ground to suppose that the testator *Sir William Daniel* meant to give this devisee any thing beyond an estate for life. The restrictive circumstances attending his particular devise, and his care to preserve the estate in his name and family and in a precise prescribed condition, indicate quite the contrary to such a supposition.

It is not sufficient, to say, that "because the testator has given an estate tail to *Samuel*, *Charles*, and *John*, he must have intended the like for every other son of his father to be begotten on the body of his then wife *M Sarah*." For, there is no appearance of any such intention. On the contrary, it would be more agreeable to his apparent intention, if these three should be continued only estates for life, to render these devises conformable to his. He cited *Co. Lit. 42. Skinner 385, 562. Beveston*

v. Halsey. Skinner 339. Middleton v. Swain, and Shotter's P. C. 207. Swaine v. Fawcner et al. S. C.

1764.

Nor will the subsequent words—“*Add for want of such issue, then to William Hulton,*” suffice to create an estate tail, where there was no estate before. *Faughon 259. Gardner v. Sheldon. 2 Vernon. 546. Cook v. Cook. Forrester 18. Lord Glenorchy v. Bosville.*

EVANS
ex dimiss.
BROOKE
v.
ASTLEY.

Mr. Hurvey, on behalf of the defendants, (who were the devisees of Sir William Duckenfield Daniel,) contended that the said Sir William Duckenfield Daniel, who was the fourth son of Charles Duckenfield, esq; was born after the making of Sir William Daniel's will; and, upon the tenor of the said will, taken all together, and by the manifest intention of Sir William Daniel the testator, have taken an estate tail under it.

[Note, 579.]

He said, it was plain that an estate tail was the least estate that the testator intended for him: and this he had barred by the recovery. But if he took a fee, then the remainder “to the testator's own right heirs” (under which remainder the lessor of the plaintiff claims) never took place.

He agreed to the three principles laid down by Mr. Blackstone; namely, “that devises are to be expounded, if possible, according to the intention of the testator; that the construction must be collected from the whole will taken together; and that the implication by which an estate tail is to be raised, must be necessary, and not merely conjectural or imaginary.”

[1574]

He said, the true rule of implications, was that which was laid down in the certificate of this court in the case of *Robinson v. Robinson*, * and affirmed by the judges in the House of Lords, on 14th of February 1758, viz. when such implication is necessary “to effectuate the manifest general intent of the testator.”

* V. ante, Vol. I. p. 38.]
(the certificate is at p. 50.)

This gentleman intended to have his estate kept entire; and his name and arms preserved. He adopts the line of his eldest sister, who had three sons, with a probability of more. He insists rigidly upon their taking his name and arms: and gives heir-looms, books, pictures and furniture: and he meant to give his three nephews their inheritance (Samuel, John, and Charles,) no more than life-estates, with contingent remainders to their male issue; though by legal construction of his words, they took estates tail. But it is very certain, that he did not intend that any remainder-man should succeed to his estate, whilst any male issue of any son of his sister Duckenfield should remain in being. The estate therefore of this after-born nephew ought to be ENLARGED by implication; because such implication is absolutely necessary, to effectuate the manifest general intention of the testator.

1764.
FRANKS
ex demiss.
BROOKE
Y.
ASTLEY.
[Qu. post.
1577.]

The court will therefore make a *construction according-*
ly, and will *supply* the proper words.

And as the proviso directs "that *Samuel Duckenfield*
" and the other devisees, *and their descendants*, shall
" upon their coming into possession, procure an act of
" parliament to take his name and arms;" and as it is
clear, that he *meant* that these *descendants* should take
his *estate*, as well as his name and arms; the court needs
only to *supply* the word "DESCENDANTS," in this devise
to the after-born son and sons; (which is indeed *necessa-*
rily implied;) and then, (let the words "and for want of
" *such issue*," be applied either to *Charles Duckenfield* esq;
or to his every after-born son and sons,) it must be con-
strued an *estate tail*: for those words would be sufficient
to create an *estate tail* in a *will*; and are rather stronger
than the word "seed" or "children."

[1575] If the words "and for want of *such issue*," can be re-
ferred to the want of issue of the after-born son *himself*,
there can then be no doubt but such after-born son took
an *estate-tail*: for, a devise "to a man, and for want of
" heirs of his body remainder over; or, if he die without
" issue: or, for want of issue;" will create an *estate tail*,
although there be no direct limitation of the estate. And
the word "*such*" may refer to the issue of the after-born
son or sons; and mean *such sort* of issue as that in de-
fault of which, from *Samuel, Charles, and John*, the tes-
tator had limited the estate to every after-born son and
sons; that is, *heirs male of the body*.

He intended an estate for life only, to his three
nephews that were in being; but he intended a different
estate, some estate of *inheritance*, to his after-born
nephews.

[Qu.] He could neither intend, nor would the law permit,
that the after-born son should take *successive* estates for
life: that would be contrary to the resolution of the case
of *Humberston and Humberston*, 1 *Williams* 332. where
the Lord Chancellor declared an attempt "to make a per-
petuity for successive lives," to be *vain*.

He could not intend that the 2d and 3d after-born sons
should take in preference to the *issue male of the first*
after-born son; and that they and they *only* should lose
the benefit of his devise; and even that they should be ex-
cluded in favour of *strangers*, as the other remainder-
men were. And it is merely *accidental*, that the pre-
sent claim is set up by a *right heir* of the testator: for
Hulton and the two *Goldstons* would have had the
same claim, prior to him, if they had *happened* to
live.

If it be asked "whether the after-born sons of *Charles*
" *Duckenfield* esq: should have taken *jointly*, or in *suc-*

"cession, in case there had been more than one;" the answer is—"in succession;" for they were not in being. If they had been in being, then indeed they would have taken jointly. This is the distinction laid down in *Cook v. Cook*, 2 *Verp.* 545. And this was the manifest intention of the testator. And to aid and effectuate his intention, the court will supply the deficiency of expression, by adding the word "descendants" or "heirs of the body" of such after-born son; or by applying the words "and for want of such issue," to the want of issue of such son. And this would not be going so far as the like point was carried in the case of *Robinson v. Robinson* before mentioned. * There *Lancelot Hicks* was construed to take an estate in tail male, he and the heirs of his body taking the name of *Robinson*: notwithstanding the express estate devised to the said *Lancelot Hicks* "for his life AND NO LONGER."

1764.
EVANS
ex dimiss.
BROOKS
v.
ASTLEY.

* V. ante,
Vol. 1. p. 38
to 53.

The case of *Lomax v. Holmeden*, in Chancery, was very near the present; and would have been almost in point, if it had received a more solemn determination. It came on by petition before Lord Hardwicke, in *Trin.* 23 G. 2. 1749. *Joshua Lomax* the petitioner's grandfather, by his will dated 9th December 1720, devised lands in trust &c.; (see 3 *Peere Williams* 176.) Then to the use of the petitioner's father *Caleb Lomax* (his son) for life; then to the use of the trustee and his heirs during *Caleb's* life, to preserve contingent remainders: then to the use of the first son of *Caleb's* body and the heirs of the body of such first son; and for want of such issue, to * second, third, fourth and fifth sons of *Caleb*, successively, and in remainder one after another; (without specifying WHAT ESTATE he gave them; the words of inheritance being by mistake omitted, as they are in the present case;) and for want of such issue, to the use of his four daughters and their heirs. *Caleb's* eldest son (named also *Caleb*) died without issue, very young. After which, the petitioner was born. Two questions were made: 1st. whether the petitioner could take as first son of his father *Caleb*; 2dly. If he could not, then whether he might not, however, take an estate tail by applying the words "such issue" to the issue of his body. It was determined upon the first point. But upon the 2d question, Lord Hardwicke said, he inclined to think that the petitioner might take an estate tail; from the latitude that must be taken in supplying the omission of the word "the" and in construing the words "successively and for want of such issue;" all which must be supplied by some construction or other; however, as he was clear upon the 1st point, he avoided giving any direct opinion upon the second. And it appears by a report of a former branch

* The word
"the" was
omitted.

[1576]

1764.
EVANS
EX OFFICIO
BROOKS
J.
ASILEY.

of the same case in *Hilary* term 1732, (3 *Peere Williams* 179) that Sir *Joseph Jekyll*, then master of the rolls, held "that the now petitioner (and then plaintiff) was intitled to take an estate tail."

Upon the whole, this after-born son took at least an estate tail: and it may be doubted whether he did ever take a fee. For the testator devises "all his manors, lands and tenements wherein he had any manner of estate:" which seems to import that he gives to the respective devisees all the estate that he himself had in them; which was, and which he takes notice to be, "a fee simple estate."

Mr. *Blackstone*, in reply—Certainly, not a fee-simple: for, the testator intended a less estate than that, to his three eldest nephews.

[1577] The words "*wherein* I have any manner of estate" only mean to ascertain the locality of the lands devised and render the description of them the more clear. His manifest intention is contrary to this construction.

Nor can it be an estate tail: because both the words and the intention agree that it is only an estate for life. And he intended no more to his three nephews *Samuel*, *Charles*, and *John*; though, in point of law, their's will be construed into estates tail.

Mr. *Harvey* supposes the condition "to take and use the testator's name and arms," to extend to the defendants of all the sons of *Charles Duckenfield*, esq. Whereas the testator expressly confines it to such of them as shall come into possession; "their descendants, to whom the premises shall come and be in possession." Their descendants are not required to take the name and arms, unless the estate comes to them. Therefore no argument can be drawn from this proviso. And in fact, the defendant's testator, Sir *William Duckenfield*, never did take the name and arms of *Daniel* for himself and his descendants; but only for himself, for life. The bill was objected to, upon that account: and the act of parliament was at last settled to extend only to himself for life.

The words "and for want of such issue" can not refer to issue not named in the will; neither is there any colour for expounding them of such sort of issue as that in default of which, from *Samuel*, *Charles*, and *John*, the estate was limited over to their after-born brothers: the same words must be construed in the same manner, in both places. This is now the case of an heir at law; and therefore is intitled to favour, upon that account.

In the case of *Lomas v. Hulmeiden*, there were two questions before Lord *Hardwicke*; one of which resembled the present case: but that point was not in question before Sir *Joseph Jekyll*. (See 3 *Peere Williams* 179.)

And Lord *Hardwicke* determined the case upon the first point, which had nothing similar to the present : whereas a determination upon the point similar to the present would have been a plain and easy method of getting rid of the whole difficulty of the case, if Lord *Hardwicke* had holden the second son of *Caleb Lomax* to have taken an estate-tail under his grandfather's will.

1764.

EVANS
ex dimiss.
BROOKE
v.
ASTLEY.

The case of *Humberston v. Humberston* does not affect our case : for Sir *William Duckenfield Daniel* was born before the devise now in question took place. [Ante, 1572, 1573.]

Mr. *Harvey* has given no answer at all to the two cases [1578] cited from *Skinner*; viz. *Middleton v. Swain*, p. 339. and *Beviston v. Hussey*, p. 502. "that a devise, without the limitation of any estate, carries BUT an estate for LIFE."

Uterius Concilium.

This case was again argued now, by Mr. Serjeant *Hewitt* for the plaintiff; and Sir *Fletcher Norton* (Attorney General,) for the defendants.

For the plaintiff it was observed, that there was no devise at all to *Charles Duckenfield* the father; and those to the three sons are all expressed to be for life: but the unborn sons have no words of inheritance annexed to their estate.

The question therefore is whether the after-born son took an estate for life, or an estate-tail.

He must take according to the intention of the devisor. *Perkins*, § 555, 556. And this intention is to be collected out of the will itself.

In arguing that the testator meant this to be an estate for life only, he cited 1 Ro. Abr. 844. Letter M. pl. 1. Moore 52. pl. 153. 3 Bulstr. 127. a case put by Mr. Justice *Croke*, of a devise of *Black acre* to his eldest son and his heirs; and of *White acre*, to his younger son, omitting the words "and his heirs;" which is very like the present. Cro. Car. 368. * *Sturt v. Benson*. Freeman 85. *Allen v. Spendlove*. [* Spirt v. Benson.]

As to the words "and for want of such issue"—"Such" does not mean the issue of the unborn son. 1 Peere Williams 54. *Bamfield v. Popham*. The word "issue" shall not, in the same devise, have a double construction, both of description and limitation. And here is no devise to *Charles Duckenfield* the father; therefore there is nothing to graft the words upon.

The case of *Langley v. Baldwin*, (Pasch. 1707. Eq. Abr. 185.) is not like this; for there, something was given to the father; here, nothing is. So, in 1 Peere Williams 754. Attorney General against *Sutton and Payman*, something was given to the father, upon which an estate tail could be grafted. So there was in the case of *Robinson v. Robinson*.

1764,
EVANS
ex dismiss.
BROOKE
v.
ASTLEY.

The case of *Lamer v. Halmuden*, 3 Peere Williams 176, would have been similar to this case, if Lord Hardwick had determined upon it, "what estate the second son should take:" but that point was left undetermined. No necessary implication arises upon the present *proviso*; because it relates only to those of their descendants to whom the estates should come, and who should be in possession. But an implication to disinherit an heir at law must be a necessary one.

As to taking the *name and arms*—Little regard is to be paid to that circumstance. 2 Saund. 384. *Purefoy v. Rogers*. There is nothing more common than for a man to take a name for life only. The meaning was, that the name should go along with the estate. Therefore nothing is to be collected from this circumstance.

[See *Ld. Raym.* 1712. and post 1580, 1, 2.]

Lord Mansfield. Suppose *Charles Duckenfield* the father had had seven or eight sons born after the will was made, but before the death of the testator: and the three first to be then all dead—What estate were the after-born ones to take? as tenants in common; or, in succession; or how?

The Serjeant answered—This *uncertainty* makes the devise to the after-born sons *void*. *Non constat* how they would take: therefore the will falls. If they would take at all, they would take *jointly* for their *lives*; as tenants in common, or as joint-tenants.

Sir *Fletcher Norton*, *contra*,—for the defendants, said that these after-born sons would certainly take *something*, by virtue of this devise: and he insisted that they took an estate *tail*, in *succession*. The testator happens only to have omitted to add the words of inheritance after the devise to the unborn sons.

As to the *intention*—The testator requires them and their descendants to take his name by act of parliament, and bear his arms; and every taker has a power to make a settlement*: but he could never mean that many after-born sons, taking jointly or in common, should *each* of them have power to jointure their *several* wives in 200*l.* *per annum a-piece*.

*The testator gives a power to make jointures to the amount of 200*l.* a year.

[1580]
† V. Equ.
Cases Abr.
p. 184. pl. 27.

Lucas, 181.

Fortescue, 133. † Equ. Cases Abr. p. 185. pl. 29. erroneously reported.

‡ V. ante, p. 22. and see 8 Mod. (the corrected edition) p. 358.

§ Equ. Abr. p. 182. pl. 23.

The cases on this head are not to be reconciled: † *Backhouse v. Wells*; ‡ *Langley v. Baldwin*; § *Loddington v. Kime*; &c.

There is no doubt but an estate tail may be raised, even contrary to the most express negative words: this was done in the case of * *Robinson v. Robinson*; where the words "and for default of such issue" were so construed.

* V. ante, p. 38 to 43.

So here, "for want of such issue" means all their children. The devise is to "every son and sons of Charles Duckenfield" the father, by his then wife; and for want of such issue, then to William Hulton, &c.

As to the cases cited from 1 Ro. Abr. and Moore 52:—The words of the will are there clear, full, and plain; and were construed according to their natural import: but they do not apply to the present case.

As to 3 Bulstr. 127. (the case put by Mr. Justice Croke) The reporter goes on—"But otherwise it shall be; where a man deviseth Black acre to his eldest son and his heirs for his part or portion; and White-acre to his youngest son for his part (omitting heirs:) yet here he shall have it in the same manner as the other hath Black-acre."

Here, the testator having devised "to every son and sons, and for want of such issue"—such issue must be applied to all their descendants: and nothing but taking an estate tail in succession could answer the intention of the testator.

Therefore William took an estate tail: and consequently, the recovery suffered by him was good; and the heir at law is barred.

Mr. Serjeant Hewitt, (in reply,) did not insist upon the devise to the after-born sons being void, but chose to keep to his first point, "that the after-born sons took only for their respective lives." [Ante, 1579.]

The word "issue" is in this will used as a word of purchase and description: therefore it shall not be, in the same will, construed as a word of limitation.

Upon Mr. Attorney's construction, the after-born sons would have a different and a greater estate than the prior-born, viz. the former, tail general; the latter, (the prior-born,) only tail male: which could never be the intention of the testator. [1581]

Therefore the rule of law ought to take place, in favour of the heir at law: and the judgment ought to be for the plaintiff.

Lord MANSFIELD first stated the case very particularly; observing, that the will was written with the testator's own hand; and made in favour of his sister's sons by her husband Charles Duckenfield.

The question is, what estate William took under this will. [Ante, 1579.]

Nothing is so clear, as that the construction must be agreeable to the intention of the testator, collected from the will.

Whatever construction would have been put in William Hulton's case, if he had been living, must be put now: for, subsequent events can not alter the true con-

1764:
EVANS
ex dismiss.
BROOKE
V.
ASTLEY.

24. 6. 1779

1764.
EVANS
ex dimiss.
BROOKE
v.
ASTLEY.

struction. Therefore all arguments in favour of the heir at law are out of the case; because this must be considered as a question between prior and subsequent *remainder-men*.

No-body can doubt of the *intention* of the testator. 'Tis too strong, to suppose that he meant *nothing* to the after-born sons.

The *words* of the will make them indeed *joint-tenants*: but it is impossible that *that* could be his *intention*: for, this testator had manifestly a pride in his family. He devises several things specifically, to be "kept for the *family*;" and desires leases to be renewed for the benefit of the *family*. They are to have power to make leases and *jointures*. What? are there to be six or seven *jointures*, *all at once*?

[2d. Raym.
312.]

It must therefore be admitted, that they are to take in *succession*. If so, the *other* circumstances must be taken in, to shew what estate he *meant* to give them. And there can be no doubt, but that he meant them an estate in *tail male*.

[1682]

Though the will is *written* with the testator's own hand, he probably *copied* it from a draught: and he seems, by mistake, to have *omitted* some words which were inserted in the original draught.

[3 Durn. 86,
87.]

In the proviso, he recites enough to shew that he meant to give it to the after-born sons in *tail male*, as he had done to the other sons.

I never had the least doubt but that the testator *intended* the same estate to these after-born sons, *by analogy*, as he had given to the prior-born.

Mr. Justice WILMOT also declared, that he had not the least doubt. He conjectured, that the cause of the variation between the devises to the born and unborn sons of Charles Duckenfield was, that the drawer of the will conceived he could not give to an after-born son for his life, and graft a limitation upon it to another person not in being, for life. (a)

If the testator had intended the latter to be *for life*, he would have said so: but he left it to the general disposition.

But whatever the *words* are, it is possible to imagine that he *intended* to disinherit his *own nephews*, for the sake of strangers; after he had *adopted* these nephews, as his own sons, for the support of his *family*; all the provisions tend to prove the contrary, most clearly. He certainly meant them to take *successively*, and not

(a) And here, according to *Blackstone*, 523. *Wilmut*, J. added "nothing is most untrue." See also 3 *Durn.* 86.

Jointly. He could never mean, that they should all live in the family-house *together*, or make several *concurrent* jointures.

"For want of *such* issue" means "for want of heirs *male* of the body:" and this is the true construction.

This case must be considered as if the controversy was between the after-born son, (*a*) and the *first remainder-man*: so that the plaintiff's being heir at law, and all arguments in his favour on *that* account, are out of the case.

Mr. Justice YATES likewise declared, he had no doubt. He took notice, that this second argument was allowed on account of the value of the estate in question: not of any doubt that the court entertained about their decision.

It can not be supposed, that the testator meant a *less* benefaction to these *unborn* nephews, than to the three devisees, his nephews who were in being. The clauses and circumstances prove his intention to be equal and the same to *all*.

Per Cur. most clearly and unanimously,
JUDGMENT for the DEFENDANT.

SILK *versus* RENNETT, *Un. &c.*

Saturday, 17th
Nov. 1764.

SIR Fletcher Norton, Attorney General, moved for an attachment against the commissioners of the court of conscience in London, for proceeding in this cause, and issuing an execution against *Rennett*, notwithstanding his having served them with a writ of privilege.

Attorney has no privilege in the London court of conscience.

The question was, whether the court of conscience in London, (the *old* city court, not under the new acts,) can proceed in a complaint brought before them against an attorney, who has served them with a writ of privilege.

[Vide 2 Wils. 42. Doug. 381. Barnes, 156. 1 Bos. 629. from which it seems that this case is not law.]

THE COURT refused the motion. For, this court of conscience has a mixed jurisdiction, as well equitable as legal: they proceed *secundum equum et bonum*; (which the recorder attested.) And (as Lord Mansfield observed) the very principle upon which these courts of conscience are founded, is, "that it is not worth while for the plaintiff to be at the expence of bringing his action in a *superior* court for such a trifling sum."

Therefore THE COURT held, that the writ of privilege did not lie: and consequently, the commissioners had a power to proceed upon the complaint

1764. brought before them, notwithstanding their being served
 SILK with one.
 V. Lord MANSFIELD observed also, that in the
 BENNETT. present case, there was the less reason to make a precedent of this kind; as it appears upon *Rennett* the attorney's own affidavit, "that he was *liable* to pay the "money."

Per Cur.

Take nothing by the MOTION.

[1584]

HAWES, EXECUTRIX, *versus* SAUNDERS.

Executors
 must pay the
 costs of a non
 pros.

THE question was, "whether an *executor* shall pay "costs upon a judgment of *NON-PROS.*"

It came before the court in such a form as may occasion some puzzle, if not particularly attended to, in respect of the places of plaintiff and defendant being reversed: for, as I take it, the executrix was plaintiff in the first action, and defendant in the second; the state of the facts being (as far as I could collect them) as follows.

The executrix brought the original action; and was *nonprossed* for want of declaring within time. The attorney for the original defendant came to the master, to sign the judgment for *non-pros.* as in a *common* ordinary case; although the plaintiff had brought the action with an *ac. etiam* as executrix; and the clerk of the judgments, as a matter of course, *without* being apprized of the plaintiff's being an executrix or suing as such, *taxed costs* against her.

Upon this judgment of *non-pros. with costs*, the original defendant brought an action against the original plaintiff; and so became *himself plaintiff* in this *second* action.

[See 4 Burr.
 1928 Law of
 Costs, 91.

3 Bosanq. 117.
 2 H. Bl. 277.
 6 Burn. 654.]

Whereupon, Mr. Stowe, on behalf of the executrix, moved for a rule to be made upon the plaintiff in this second action, for him to shew cause, "why further "proceedings in this *second* action should not be stayed, "with costs:" and in the mean time, further proceedings therein were stayed.

On Wednesday, the 11th of July last, Mr. Dunning, on behalf of *Saunders*, the defendant in the first action, but now become plaintiff in the second, shewed cause; and insisted "that an executor being *non-prossed* is *liable* to "pay costs."

This is entirely the executor's *own fault*: and an executor is only intitled to this privilege, in cases where the fault is *not his own*.

For this reason, he shall pay costs for not going on to trial according to his notice given.

He cited Mr. Cooke's book of Practice in C. B. and

Barnes's notes in C. B. part 2. p. 107. *Ogle, executor, v. Moffat*—“that a plaintiff making *wilful* default, shall pay costs for not going on to trial; though he sues as executor.” 1764. HAWES v.

So, in the case of *Eaves v. Mocato*, 1 Salk. 314.* It was holden “that an executor shall pay costs for not going on to trial according to his notice; though he shall not pay costs of a *nonsuit*.” * See S. C. cited in 1 Salk. 307. more correctly.

His proper method would have been, to have discontinued his action: in which case, he would not have been liable to pay costs. † See the note below.

Mr. Stowe, *contra*, would have had it understood, “that not going on to trial according to his notice,” was the single instance in which an executor should pay costs.^(a) And he cited *Baynham v. Matthews*, 2 Strange 871. where an administrator had leave to *discontinue* without costs. ‡

* Yet see Mr. Serjeant Sayer's Law

of Costs, 87. who cites a subsequent case “that an executor who has leave to *discontinue* must pay costs; the discontinuance being always made necessary by *some* default of his own.” Rep. Pr. in C. B. 79. *Haydon v. Norton*, Mich. 6 G. 2.

V. ante, p. 1451. *Harris, executor, v. Jones*, H. 1764. B. R. where, the giving an executor leave to *discontinue* was holden discretionary; and was refused, unless he would consent to pay costs.

And V. post p. 1927. M. 7 G. 3. *Bennet (administrator) v. Coker*.

Mr. Justice YATES observed, that the case of a *non-pros.* and that of a *discontinuance* differ. The former arises from the executor's *own delay*: and therefore he thought, and so also did Lord MANSFIELD, “that it was similar to the case of his not going on to trial according to his notice.” However,

THE RULE WAS ENLARGED.

On Saturday, 17th November,

Mr. Stowe, on behalf of the executrix, now said, there was no necessity to sign a judgment of *nonpros* because (there being no declaration) the defendant might have got himself discharged for want of prosecution within two terms.

Lord MANSFIELD—The privilege of executors is too great already. They ought to be properly informed, before they bring actions. The distinction made between a *discontinuance* and a *nonpros.* is a very good one: it is very reasonable that the executrix should pay costs in the present case.

RULE DISCHARGED.

(a) And sometimes not then, 4 Burr. 1927.

1764.
HAWES
V.
SAUNDERS.

So that the determination of the court was, "that an executor *shall* pay costs of a *non-pros.*" But An executor does *not* pay costs upon a *non-suit*.
V. *Cro Jac.* 229. *Haywarth v. David.*

Note—The two late prothonotaries of C. B. Sir *George Cooke*, and Mr. *Borret*, held and acted *differently*, upon the present question (*i. e.* upon a *non-pros.*)

This court now put it upon the foot of the *laches* in the executor; this being a *non-pros.* for want of declaring in *due time*.

[See 4 Burr. 1929 an instance implicitly put to the contrary.]

So an executor shall pay costs, if he does not go to trial, after having given notice of trial.

COMBE, Esq. *versus* PITT.

Monday, 19th Nov. 1764.

See the former branches of this case, in pages 1335 and 1423.

[S. C. 1 Bl. 437. 532.]

Evidence on the bribery act.

THE defendant having answered over; and the cause having been now tried, and a verdict found for the plaintiff, but subject to the opinion of the court—

Sir *Fletcher Norton*, Solicitor General, had, upon *Thursday*, the 10th of *November* 1763, moved, on behalf of the defendant, "that the verdict might be entered up for the defendant;" reserving (by consent of the plaintiff's counsel) the liberty of making a future motion, either for a new trial, or in arrest of judgment.

At present, he insisted upon three objections against the verdict for the plaintiff: *viz.*

1st. That the plaintiff had given no evidence to shew "that the persons bribed or attempted to be bribed *were* " *VOTERS*, (*i. e.* had a right to vote,) at the *time* of the "offence being committed."

2d. That it did not appear by any evidence given "that *Lord Egmont*, (who was charged to be a candidate, "and for whom these persons were to give their votes) "was then declared a candidate."

[1587] 3d. That the charge was for bribing or attempting to bribe them to vote for Mr. *Lockyer*, and the *Earl of Egmont*, BY NAME: whereas the evidence went no farther than to prove "that the bribe was given or offered, to "vote for Mr. *Lockyer* and *his friend*," (generally, and without naming either *Lord Egmont* or any other friend in particular.) So that there is a *variance* between the charge in the declaration, and the evidence brought in proof of it: and the evidence is not sufficient to support the charge.

And he then obtained a

RULE to shew cause.

But afterwards, upon *Monday*, the 24th of *May* 1764.

THE COURT thought, and the counsel agreed, that this was a *hard* action, as the defendant had already

been punished, in *some* degree, upon the * information: and therefore the motion then went off, to see if the matter could not be compromised; to which, the counsel on both sides seemed very well inclined.

However, the parties could not agree upon any compromise; the defendant being unable or unwilling to pay more than 50l. which the plaintiff was not content to accept. Whereupon,

Cause was now shewn by Mr. Serjeant *Davy*, Mr. Serjeant *Burland*, Mr. *Ashhurst*, and Mr. *Popham*. They thus answered the objections—

1st. The plaintiff was † not obliged to prove “that these persons had a *right* to vote:” it was enough, “that they *did* vote.” Their *right* to vote was not *traversable*. Their being allowed to vote, was evidence proper to be left to a jury, of their right to vote. The defendant has *admitted*, that they had a right to vote: his agreement was made with them, upon the foot and admission of their having such a right; and they have actually exercised it, by voting. The *substance* is proved: the *circumstances* are immaterial. 1 *Salk.* 234. *Galloway v. Susach.* 2 *Ro. Abr.* Tit. *Trial*, p. 707, 708.

2d. It is not at all material, “*who* were the candidates declared at that time:” it is an *immaterial* allegation, not necessary to be proved: *utile per inutile non vitiatur*. It is not substance; but *only a circumstance* not necessary to be proved; as in *Batson et al. v. Sayer.* 1 *Str.* 728. And this is a charge, not for a private, but for a *public* offence: and it is just the same offence with regard to the *public*, whether Lord *Egmont* was then *declared* a candidate, or not. One of the two, (Mr. *Lockyer*,) was certainly then *declared* a candidate: and this was undoubtedly a bribe, “to vote for *one* of the candidates.” This alone was criminal, within the act.

3d. The bribe was proved to be, “to vote for Mr. *Lockyer*.” the rest was immaterial, and therefore unnecessary to be proved. It had been sufficient, if the charge had only been “that the bribe was to induce the person bribed or attempted to be bribed to vote for Mr. *Lockyer alone*.” for, the corrupting to vote for *either*, is a crime which the act of parliament intended to punish. Besides, it appeared in evidence, “that Lord *Egmont* was that friend of Mr. *Lockyer*’s, for whom the corrupted person was to give his vote.” So that he was *properly* thus described; and it is *tantamount* to the witnesses having named him by name.

Sir *Pletcher Norton* (now attorney general) and Mr. *Dunning*, premising, that this was a sort of criminal conviction, and in a severe action for thrice 500l. proceeded to support the objections.

1764.

COMBE

v.

PITT.

* *V. ante*,
p. 1340.† *V. Rush v.*
Rawlins and
the Malden
causes in C. B.

[1538]

1764.
COMBE
V.
PITT.

1st. The plaintiff alleges in his declaration, "that Mr. *Lockyer* and Lord *Egmont* had declared themselves candidates; and *whilst* they were candidates, the defendant *Pitt* bribed *White*, who had a right to vote, &c. to give his vote for them." As the plaintiff has averred, "that the defendant bribed this man, who had a right to vote," it was incumbent upon him, to prove "that the man had such right, at the time of his being bribed." If he had no right, nor claimed any, it was no offence within the act. They have not charged any thing about his claiming a right, nor put the offence upon that foot: they have tied themselves up to his having such a right, by alleging "that he had a right, &c." And this never was referred to the decision of the jury: their verdict was given upon our mutual consent "to refer the points of law to the court." Whatever offence they might have charged the defendant with, he certainly is not proved guilty of the offence as it is charged. The evidence was contrary to the allegation. They ought to have proved "that at the time of being bribed, he had a right to vote." Whereas, the evidence was, "that at that time he had no right to vote; but was to acquire one in future, by forty days residence." The poll was indeed produced, to shew "that he had voted." But his subsequent voting does not prove that he had a right to vote, at the time when the bribe was given.

[1589] 2d. They also ought to have proved "that Lord *Egmont* had declared himself a candidate at the time when the bribe was given or offered." For, they have alleged in their declaration, that it was done "*whilst* Mr. *Lockyer* and he were candidates." They ought to have proved this allegation, as they have set it forth. They should have proved it to be the same offence as they have described; and with so much certainty and precision, that the defendant might be able to plead "*autrefois acquit*," in case of another action's being brought against him for it. The bribing "*whilst* Lord *Egmont* was a candidate," is the offence here charged: and this could not be pleaded to an action for bribing, &c. at another time, when he was not a candidate. It is a material substantial part of the charge: and the defendant might have traversed that he did it *whilst* they were candidates. In fact, Lord *Egmont* was so far from being a candidate at that time, that he was not then thought of.

3d. The plaintiff alleges in his declaration, "that the bribe was to induce *White* to vote for Mr. *Lockyer* and Lord *Egmont*." It was incumbent upon him to prove this, as laid. But this he neither did do, nor could do: for, in truth, it was uncertain at that time, who Mr. *Lockyer's* friend would be; and Lord *Egmont* was not so much,

as thought on. It was impossible, therefore, that the term "Mr. *Lockyer's* friend," could mean or be applied to any particular person; much less, to Lord *Egmont*.

LORD MANSFIELD—The defendant was convicted upon an information granted by the court, for this same offence: and when the court gave sentence upon it, they considered him as *remaining still liable* to the forfeitures and disabilities directed by the act of parliament, and to the civil action which might be brought upon that act; * as the time limited for commencing prosecutions upon it was not then expired. The court will never interpose again, by way of information, whilst the matter remains open to the civil action. However, in this man's case, it did so happen: and the hardship of his being doubly punished for the same offence had some weight at the assizes, in not leaving the matter to the jury. The same inclination has operated with us here: and we wished a compromise. This wish is now desperate: I am sorry for it. But since it is so, the law must have its course: we must not make a precedent in opposition to the statute.

I have no doubt, as to any of the three objections that have been made. In penal actions, the *material fact* must be charged: and a fact must be proved in such a manner, that all those consequences will follow the verdict, which ought to attend it. But *aggravations*, and all circumstances that *do not vary* the offence, are out of the case, as to the necessity of proving them.

A man who has given money to another *for his vote*, shall not be admitted to say, "that such other person had no right to vote." However, it appears that *this* person *had* a right to vote; unless he should lose it by non-residence: and he appears, upon the poll, to have actually voted.

"*Candidate*" is a vague term: no certain idea is fixed, by law, to it. But Mr. *Lockyer* was certainly a candidate: and this was a bribe to induce *White* to vote for him, at least. Surely, *asking a vote* for a man, is enough to make him a candidate. *Lockyer* was clearly a candidate himself: and the bribe was, "to vote for him and his friend."

The bribing to vote for one or both or either of these persons, is criminal within the act: and, if proved, is sufficient. And here it is proved, "that the bribe was, to give his vote for Mr. *Lockyer*."

Therefore, upon the whole, the verdict ought to stand.

Mr. Justice WILMOT (who tried the cause) owned, he had wished for an accommodation; because the man would be twice punished for the same offence; though that upon the criminal information was inflicted

1764.
COMEE
V.
PITR.

* V. ante,
p. 1340.

[1590]
1st Object.

2d Object.

3d Object.

[See 2 Durn.
198.]

1764.

COMBER

v.

PITT.

1st Object.

with lenity, on account of the man's remaining still liable to a civil action.

As to the objections, he said, he had not nor had had any doubt, in the least degree.

The giving *White* the bribe for his vote, admits his having a right to vote: and it was proved by the poll, "that he did vote."

2d and 3d Objects.

There is no real variance between the *material and substantial* charge, and the evidence. The material and substantial charge is bribing this man "to vote for Mr. Lockyer, and another, at the election." The material offence is bribing to give a vote for Mr. Lockyer then a candidate: and I think it is pointed out so certainly, that it *might* be pleaded in bar to any other action brought for the offence of bribing at this election.

Mr. Justice YATES expressed the like sentiments with Lord MANSFIELD and Mr. Justice WILMOT. He thought it a reflection upon the plaintiff's humanity, to proceed with rigour for a second punishment, for the same offence. But he had no difficulty as to the force of the objections.

[1591]

1st Object.

A right to vote is *admitted*, by bribing him to give his vote. And it was proved by the poll, "that the man *did* vote:" which is a presumption of his having a right

[2 Wils. 399.]

to vote. But it is *totally immaterial*, "whether he had a right to vote, or not;" because the act of parliament says,* "that if any person who hath or claimeth to have, or hereafter shall have or claim to have any right to vote, &c. shall take, &c. or if any person, &c. shall, by, &c. corrupt or procure any person or persons to give his or their vote or votes, &c." And this man certainly *claimed* a right to vote, and did vote.

2d Object.

Such a *traverse* as has been mentioned, "that the defendant did not give or offer the bribe whilst these persons were candidates," would have been *bad*; because it would not apply to the *material* offence.

3d Object.

Id certum est quod certum reddi potest. The Earl of Egmont was known, at the time of the election, to be the other candidate. The offence described by the statute is "corrupting or procuring any person or persons to give his or their vote or votes in any election of any member or members to serve in parliament:"† and the crime and the penalty are the same, whether the bribe be given "to vote for one," or "to vote for both." This is not so tied down by the particular description, that a recovery in this action could not be pleaded in bar to another action for bribing at this election. For, it might be so pleaded in bar: and the fact might be identified to be the same, by proper arguments.

† V. s. 6, and s. 7. taken together.

Per Cur. unanimously,

THIS RULE WAS DISCHARGED ;

And the VERDICT ordered to STAND.

But liberty was reserved (as is abovementioned to have been agreed) for the defendant's counsel to move either for a new trial, or in arrest of this judgment.

And they afterwards moved for a new trial.

V. post. pa. 1682.

1764.

COMBE

v.

PITT.

OULTON, the Younger, *versus* PERRY.

[1592]

Tuesday, 20th
Nov. 1764.

MR. Barnes, on behalf of the defendant, moved to stay the plaintiff's proceedings, upon an affidavit " that the defendant owed the plaintiff only *nine shillings*;" and cited the case of *Machin v. Robinson*, Tr. 28 G. 2. B. R. where the proceedings were stayed, because the cause of action was so trifling, being only for 20s. it was therefore holden to be *infra dignitatem curiæ*.

Per Cur. and Master Owen—There, it appeared upon the very face of the declaration. Here, the plaintiff demands more; the defendant alleges it to be less: the court cannot try the *quantum*, upon *affidavit*. The distinction is, where it appears upon the face of the declaration, or not.

MOTION DENIED.

N. B. Master Owen said, that Lord *Hurdwicke* had, at first, made some rules of this kind; but afterwards, would not make any more.

MENETONE *versus* ATHAWES.Thursday, 22d
Nov. 1764.

THIS was an action by a ship-wright for work and labour done and materials provided, in repairing the defendant's ship. And the question was, " whether the plaintiff was intitled to recover, under the following circumstances."

The ship, being damaged, was obliged to put back, in order to be repaired in dock; and was to have gone out of the dock on a Sunday: in the interim, viz. on the day before, only three hours work was wanting to complete the repair, a fire happened at an adjacent brew-house, and was communicated to the dock; and the ship was burnt.

N. B. It was the ship-wright's own dock; and the owner of the ship had agreed to pay him 5l. for the use of it.

This case was argued on Tuesday the 13th of this month by Mr. *Murphy*, for the plaintiff; and Mr. *Dunning*, for the defendant.

For the plaintiff, it was insisted that he was not answerable for this event, which happened without his ne-

*See 5
H. 1.
137.*
The value of repairs may be recovered, though a ship be burnt in dock.

1764. glect or default; unless there had been some *special* undertaking.

MENETONE

v.

ATNAWES.

[Vide post.

1640. and

Comyds, 627.]

20 and 5/2 u 1

Indeed, a tenant is bound to provide the landlord as good a house, in case of its being burnt, *if* he covenants to deliver up the house to him again, in as good repair as it was then: upon such a *special* undertaking, an action would lie; but *not otherwise*. Doctor and Student, dialogue 2. chap. 4.

In the case of waggoners and common carriers, they are bound to answer for the goods against all events, but acts of God, and of the enemies of the king. 2 *Ld. Raym.* 909. *Coggs v. Bernard*, 1 *Strange* 128, *Amies v. Stephens*. And a gaoler is excuseable from escapes in those cases: 1 *Ro. Abr.* 808. *pl.* 5, 6. And in like manner, where it is the act of God, the person who has the custody of another man's *property*, is excused.

The plaintiff here was a general bailee only: therefore not chargeable. 1 *Inst.* 89. He was only obliged to keep it as he would keep his own.

The case of *Coggs v. Bernard* in 2 *Ld. Raym.* 909. over-rules *Southcot's* case, in 4 *Co.* 84.

Even a pawn remains the property of the original owner. 2 *Str.* 1187. *Sir John Hurtopp v. Hoare*: the plaintiff was considered as a mere bailee, for safe custody only.

In insurances made by merchants, it is usual to insert docks. The men were on board of this ship: (though that makes no difference.)

The plaintiff therefore was not answerable for this loss of the ship. And if the plaintiff be not liable for the loss of the ship, he is intitled to be paid for his work and materials. The materials must be considered as having been delivered. The merchant always pays 5l. for the hire of a dock: and so he agreed to do in this case. And these materials were delivered on board his ship in this dock.

When tithes are set out, they are thereby vested in the parson; and he may maintain trespass for any injury done to them.

The defendant might have sold this ship, while it was in the dock; and these materials would have been part of it: the fixing them to the ship was a delivery of them. The adjunct must go with the subject. Dr. *Cowell*, in treating of the various modes of acquiring property, is of this opinion.

Mr. *Dunning*, *contra*, for the defendant.

The question is, "whether the plaintiff is intitled to be paid by the defendant for *that* work and labour from which the defendant neither did nor could reap any advantage."

The plaintiff was obliged to deliver the ship safe; having undertaken to repair it.

The defendant has had *no benefit* from the plaintiff's labour or materials; neither was the plaintiff's undertaking *completely* performed.

Carriers and hoy-men can not be intitled to be *paid for carrying* things that perish *before* they are delivered: nor jewellers, for setting a jewel, that is destroyed *before* it is set. So a taylor; where the cloth is destroyed *before* the suit is finished. So of any *unfinished incomplete* undertaking.

As there is no express agreement to support this action, the court will not imply any.

Mr. *Murphy*—in reply. As to the defendant's not having had the *benefit* of the repair—There is no reason why the ship-wright should not be paid for his *work and labour and materials*. *Digest*, title *De Negotiis gestis*. The defendant might have insured his ship.

Nothing can be due to a carrier or boyman, *till the delivery* of the goods at the destined place. But these materials *were delivered*; and the work and labour *actually done*.

Suppose a horse sent to a farrier's to be cured, is burnt in the stable before the cure is completely effected: shall not the farrier be paid for what he has *already* done?

A pawn-broker, if the pawn is destroyed by the act of God, shall recover the money lent.

LORD MANSFIELD—This is a desperate case for the defendant (though compassionate:) I doubt it is very difficult for him to maintain his point. Besides, it is stated, "that he paid 5*l.* for the *use* of the dock."

Mr. Justice WILMOT—So that it is like a horse that a farrier was curing, being burnt in the owner's *own* stable. [1595]

Mr. ATTORNEY GENERAL being retained to argue it for the defendant—

THE COURT offered to hear a second argument from him, if he thought he could maintain his case: but seemed to think it would be a very difficult matter to do it.

Mr. ATTORNEY GENERAL appeared to entertain very little hope of success; however, he desired a day or two to consider of it. But

Mr. RECORDER now moving "that the *postea* might be delivered to the plaintiff."

The Attorney General did not oppose it.

And a RULE was made accordingly,

That the *postea* be delivered to the PLAINTIFF.

1764.

MENETONE
V.
ATHAWES.

1764.

Wednes 28th
Nov. 1764.[S. C. 1 Bl.
496, 526.]If the vouchee
die on the
return day of
the writ of
summons,
being on a
Sunday, the
recovery is
bad.SWANN *versus* BROOME.

THIS came before the court, upon a writ of error from the court of *Common Pleas*, upon a common recovery suffered there.

By consent, the error assigned was in *this*, "that the day of the return of the writ of summons was on *Sunday* the 13th of *May* 1750: on which said 13th day of *May*, *Edward Swann* the younger, tenant in tail male, and vouchee in the common recovery, *DIED without issue male* of his body."

On 3d *July* 1761, the case was argued, by Mr. Serjeant *Hewitt* for the plaintiff, and Mr. *Walker* for the defendant; and on the 9th of *November* 1764, by Mr. *Blackstone* for the plaintiff, and Mr. Serjeant *Glynn* for the defendant.

[See 18 Vin.
239. Salk. 627.
also 2 Finch.
235. and
1 Hen. Bl. 10.]

[1596]

THE COURT, from the beginning, shewed a strong inclination to support the recovery if possible.

The questions were *two* :

1st. "Whether the judgment could *relate* to the *essoign-day* of the *term*: or to any day *prior* to the 13th of *May*, the *essoign-day* of the *return*."

2d. "Whether, by law, a *valid* judgment could possibly be given *on* the day of the return, being *SUNDAY*."

THE ARGUMENTS at the bar were of great length; and every authority relative to judicial proceedings upon a *Sunday*, ransacked on both sides: but it would be of no use, now, to report them at large.

LORD MANSFIELD now delivered the resolution of the court, "that the recovery was *bad*; because no judgment could be supposed to be given before the death of the tenant in tail. That this judgment could not relate to the *first day of the term*; because it could not be given before the *return* of the writ of summons, which appears by the record to be *in the term*. That it could relate only to the *essoign-day of the writ of summons*, which was upon a *Sunday*; on which *Sunday*, the tenant in tail died."

HIS LORDSHIP also gave the reasons upon which this opinion was grounded: which were somewhat to the following effect.

This is a writ of error upon a judgment in the court of *Common Pleas* in a common recovery. The fact, as it appears upon the record, is, "that a writ of summons was returnable at a return-day *within the term*: and the tenant in tail died *upon the essoign-day* of that return; which *essoign-day* happened on a *Sunday*." This is all that is necessary to be stated.

Though common recoveries are now considered as common assurances, yet they must be conducted and completed according to certain ceremonies and solemnities which bear analogy to the proceedings in real actions: and the want of such necessary solemnities invalidates a common recovery, as much as the want of a third witness invalidates a will of lands.

A judgment relates to the essoign-day of the term, *unless* any thing appears upon the record to the contrary, shewing "that the judgment can *not* have that relation." (a)

If the tenant in tail was alive when the judgment was given or may be supposed to have been given, such judgment is *good*: if not, then it is a *bad* judgment, because given *after the death* of the tenant in tail.

Where it appears upon the face of the record, that the relation *could not* be on the *essoign-day of the term*, but to a *subsequent day*, the *presumption* of such relation must *cease*: because it cannot possibly be supposed or intended "that it *was* given upon that day," when it appears upon the face of the record impossible that it could be so.

Where any such matter is apparent upon the face of the record, the judgment then relates *only so far back*, as it may, *consistently with the record*, be intended or supposed to relate.

If the essoign-day of this writ of summons had been upon a *week-day*, the judgment would, by relation, have been a *good* one, because it *might then* have been intended or supposed "that it was *really* given upon the day to which it related." [Contra, 1 Buls. 35.]

But *this* essoign-day of the writ of summons is upon a *Sunday*; and from thence the objection arises; it being insisted, on the part of the plaintiff in error, "that judgment *could not* be given upon a *Sunday*."

It is clear, that *if the court could not sit* on a *Sunday*, it would be impossible for this judgment to have been given before the death of the tenant in tail; for, he died upon that *Sunday*.

(a) *Contra*, 1 Buls. 35, where it is a judgment by default as was this case, for there it relates to the *quarto die post*, as there held on clear grounds. And the same point was held in the case of a fine, 2 Wils. 115. Yet if the appearance had been in person and not by attorney, the death could not be assigned for error, being contrary to record: but clearly the judgment in the recovery might in that case be set aside on motion for irregularity.

1764.

SWANN

v.

BROOME.

The single question therefore is, "whether the court
" *can sit on a Sunday, and give a valid judgment.*"

No express direct authority has been cited in proof
of the affirmative side of this question. Those autho-
rities that have been urged in support of it, have been
only *argumentative*: from whence such a conclusion
might, as it is said, be drawn.

BUT the *history* of the law and usage, as to courts
of justice sitting on *Sundays*, makes an end of the ques-
tions.

ANCIENTLY, the courts of justice *did* sit on *Sundays*.

The *fact* of this, and the *reasons* of it, appear in Sir
Henry Spelman's Original of Terms.

* c. 3. p. 75.

[1598]

It appears by what he says, that the ancient Chris-
tians practised this. In his* chapter of Law-Days among
the first Christians, using all times alike, he says, "the
" Christians, at first, used all days alike, for hearing of
" causes; not sparing, (as it seemeth) the *Sunday* itself."
They had two reasons for it. One was, in opposition to
the heathens; who were superstitious about the obser-
vation of the days and times, conceiving some to be
ominous and unlucky, and others to be lucky: and
therefore the Christians laid aside *all* observance of
days. A second reason they also had; which was, by
keeping their own courts *always open*, to prevent Chris-
tian suitors from resorting to the heathen courts.

* v. c. 4.
p. 76.

But in the year 517, a* *canon* was made, "Quòd
" nullus episcopus vel infra positus de Dominico causas
" judicare præsumat." And this canon (for exempting
Sundays) was *ratified* in the time of *Theodosius*; who
fortified it with an imperial constitution: "Solis die,
" (quem Dominicum rectè dixere majores,) omnium
" omnino litium et negotiorum quiescat intentio." The
whole canon is also decreed verbatim, in the Capitulars
of the emperors Carolus and Ludovicus.

+ v. c. 5.
p. 76, 77.

There are likewise several other canons taken notice
of, in *Spelman's* Original of the Terms.† One of them
was made in the council of *Tribury*, about the year 895:
"Nullus comes, nullusque omnino secularis, diebus
" Dominicis, vel sanctorum in festis, seu quadragesimæ
" aut jejuniorum, placitum habere, sed nec populum
" illo præsumat coercere." Another of them was made
in the council of *Erpfurd* in the year 932; and after-
wards became general, upon being taken into the body
of the canon law, by *Gratian*; and Sir *Henry Spelman*
takes it, he says, to be one of the foundation-stones
of our terms, "Placita secularia Dominicis vel alijs festis
" diebus, seu etiam in quibus legitima jejunia celebra-
" tur secundum canonicam institutionem minimè fieri
" volumus." It goes on and appoints vacations. But

these vacations were enlarged by the council of *St. Medard*: "Dècrevit sancta synodus, ut à quadragesima
 "usque ad octavam Paschæ, et ab Adventu Domini
 "usque ad octavam Epiphaniæ, necnon in jejunijs
 "quatuor temporum, et in litanijs majoribus, et in
 "diebus Dominicis, et in diebus rogationum (nisi de
 "concordia et pacificatione) nullus supra sacra evan-
 "gelia jurare præsumat." By which expression is
 meant, that no causes should be tried, or pleas holden,
 on those days.

1764:
 SWANN
 V.
 BROOME.

These canons were received and adopted by our *Saxon*
 kings.† And *Edward* the confessor made the following ‡ V. c. 7, 8.
 constitution: § "Ab adventu Domini usque ad octabas p. 77, 78.
 "Epiphaniæ, pax Dei et sanctæ ecclesiæ per omne and c. 9. p. 79.
 "regnum; similiter, à septuagesima usque ad octabas § V. Leg. Ed
 "Paschæ; item, ab ascensione Domini usque ad octabas Conf. c. 9.
 "Pentecostes; item, omnibus diebus quatuor tempo-
 "rum; item, omnibus sabbatis ab hora nona, ET TOTA [1599]
 "DIE SEQUENTI USQUE AD DIEM LUNÆ; item, vigilijs,
 " &c."

These canons and constitutions were all confirmed by
William the conqueror and *Henry* the second; * and so * V. c. 10.
 became part of the common law of England. p. 80. & c. 11.

Afterwards, in succeeding times, there happened se- p. 81.
 veral alterations and relaxations. The statute of *West-*
minster the † first, and other statutes, were made to this † 3 Ed. 1.
 purpose; and usage, or perhaps positive laws not now c. 51.
 extant; dispensed with other days that were formerly
 unjuridical.

The Mirror of Justices ‡ says, "abusio est que ‡ c. 5 § 1.
 "tient pleas per *dimanches*, ou per auters jours defendus, Artic. 111.
 "ou devant le soleil levie, ou noctantre, ou in disho- [p. 246]
 "nest lieu."

Lord Coke, in his 2d Institute, p. 264. commenting
 upon *W. l. c. 51.* says, "in the common law, there be
 "dies juridici, and dies non juridici. Dies non juridici
 "sunt dies Dominici, the Lord's days, throughout the
 "whole year."

In *Dyer*, 168. pl. 17. upon a judgment given in the
Common Pleas in a *scire facias* upon a recognizance, error
 was assigned in that the teste of a *scire facias* was upon
 a Sunday, which is not *dies juridicus* in banco; the teste
 being on the 28th of November, which happening that year
 on Sunday, the term did not end till the 29th.

In *Sir William Jones*, 156. *Becloe v. Alpe*, (a) upon an

(a) In *Bunb.* 177. it is reported that the court of Ex-
 chequer thought this case not law; but there it was cited
 for another point,

1764.
SWANN
v.
BROOME.

information in the *Exchequer*, for ingrossing butter and cheese contrary to the statute of 5, 6 E. 6. and a verdict and judgment against the defendant, and a writ of error brought by him in the *Exchequer* chamber to reverse it; and a reference of it by the court to *Hutton* and *Jones*; the first error assigned was "that the information was exhibited in court on the 13th of *October*, which, in that year (20 Jac. 1.) was a *Sunday* and therefore not *dies juridicus*." But it was resolved by *Hutton* and *Jones* "that it was good: for, although it was not *dies juridicus* for the award of any judicial process, or to make an entry of any judgment on record, yet it was good for accepting an information upon a special law;" (of which kind of informations many precedents were shewn.) And upon *Hutton's* delivering his own and *Jones's* opinion to the court, they affirmed the first judgment, notwithstanding the errors. But at the same time that these two judges held it good for accepting an information upon a special law, they said, "that *Sunday*" [1600] "was not a *dies juridicus* for the awarding of any judicial process, nor for entering any judgment of record." The awarding of process, and the giving of judgment, are judicial acts; and therefore cannot be supposed to be done, but whilst the court is actually sitting.

As to WRITS being returnable on *Sundays*—

Writs were formed in those times when the courts of justice might sit on *Sundays*; and these ancient returns, which were not improper when the writs were first formed, have continued ever since, without being altered in succeeding terms. The *canons* did not at all interfere, so as to make any alteration in them: for the *canons* extend their prohibition no further than against awarding process and giving judgment, and such like acts of court, on *Sundays*. So that the writs have continued in their primitive form: but no business can be done by the court, till *Monday*. The day of their being actually returned, is therefore as certainly known, as if the writs were made returnable on *Monday*.

Fitz-herbert in his *Natura Brevium*, under the writ *de warrantia Diei*,* (to excuse the default of appearance in court at the day assigned, on account of being in the king's service on that day,) specifies one of those writs in these words—"Rex, &c. Scitis quod A. fuit in servitio nostro die LUNÆ in crastino quinden' Pasche proxim' præterit': ita quod eo die interesse non potuit loquelæ quæ est inter, &c."

In 12 Edw. 4. 8. b. pl. 22. upon a demurrer, in an action of trespass brought by the prior of *Lantony*, *Pigott* said "if the day of a return, scilicet the quarto die, falls

* Old edition, p. 17.
New edit. p. 36.

" in *die Dominica*, no court shall be holden, but in the day following." 1764.

As to the practice of giving notice " to appear on the Sunday"— SWANN
v.
BROOME.

The answer is, that *whilst* the courts *did sit upon Sundays*, the notice must follow that practice *then* in use; and must, of consequence, be given for appearing on the *Sunday*: but *now*, the old practice " of their actually sitting upon *Sundays*" being altered and at an end, these notices must necessarily relate to the *Monday*, when the courts do sit, and before which day they cannot sit; and therefore the defendant cannot be misled by having notice given him " to appear on the *Sunday*."

As to the observation " that the courts of justice have [1601] never been restrained by act of parliament, from sitting on *Sundays*; and that the 29th C. 2. c. 7. does not extend to giving judgments"—

It was needless to restrain them from it by act of parliament. They could not do it, by the canons anciently received, and made a part of the law of the land: and therefore the restraining them from it by act of parliament, would have been merely *nugatory*. But fairs, markets, sports and pastimes, were not unlawful to be holden and used on *Sundays*, at common law: and therefore it was requisite to enact particular statutes, to prohibit the use and exercise of *them* upon *Sundays*, as there was nothing else that could hinder their being continued in use.

In *Mackalley's case*, in 9 Co. * It was objected, that * v. p. 66. b. *Sunday* " is not *dies juridicus*; and therefore no arrest " can be made in it: and every one ought to abstain " from secular affairs upon that day." But it was answered and resolved, " that no judicial act ought to be " done in that day: but ministerial acts may be lawfully " executed in the *Sunday*."

It has been said, " that a mere *ideal* relation to *Sunday* " could not come within the notion of a profanation of the " day, as it is only a fiction of law, not founded upon an " actual fact of the court's really sitting and giving judgment upon that day."

But the answer to this, is, that *if* it be impossible for the court to sit on a *Sunday*, then there can be no such relation: for, an absolute impossibility can not be supposed.

It has been said, " that the tenant in tail had done all " that was *essential* for him to do: the rest was only " *form*."

The answer is—The law requires, as *essentially necessary* to validate a common recovery, certain forms, solemnities or ceremonies that have analogy to real suits: it makes

1764. these requisites absolutely and essentially necessary to the
 SW H N completion of it. And *till* it is *completed*, it is *no* recovery,
 V. no conveyance: the tenant in tail has not regularly and
 BROOME. properly *executed* the conveyance by which he would cut
 off the intail, defeat his own issue, and bar the remain-
 ders. A conveyance ~~not~~ properly *executed* is the same
 as *no* conveyance at all. Here, he died *before the return* of
 the writ of summons, and before he either did or could
appear to it: for, though the writ is, in words, made
 returnable on the *Sunday*; yet, as the court could not
 sit on *Sunday*, he could not possibly appear to it before
Monday.

[1602] On the face of this record, it is manifest, that the ten-
 ant in tail *could not* have appeared till *Monday*: and no
 judgment could be given against him *till* he had appeared.
 It is impossible therefore that this judgment could be
 given before *Monday*. But he died on *Sunday*. Conse-
 quently, the judgment appears to have been in fact given
after the death of the tenant in tail.

We are very sorry to find ourselves *obliged* to reverse a
 common recovery upon such an objection to it: and we
 have struggled hard, to try if it could, by any *legal* means,
 be supported. But, notwithstanding our inclinations to
 support it, we can not help declaring our opinion, "that,
 " in point of *law*, this judgment is *erroneous*, and ought
 " to be reversed."

JUDGMENT REVERSED.

A writ of error was brought in parliament upon this
 judgment: and after hearing it, upon the 2d of *May* 1766,
 the lords proposed the following question, which was put
 to the judges, *viz.*

" Whether the recovery is good or erroneous; the
 " return day of the writ of summons being on *SUNDAY*
 " the 13th day of *May*: on which day *Edward Mann*
 " the younger died."

" THE LORD CHIEF BARON delivered the unanimous
 opinion of the judges, " that the recovery is *erroneous*."

ORDERED AND ADJUDGED, that the judgment of the
 court of *King's Bench* be *AFFIRMED*; and that the record
 be *remitted*; to the end such proceeding may be had there,
 upon, as if no such writ of error had been brought into
 this house.

HILARY TERM,

1605

5 GEO. III. B. R. 1765.

TIMMINS *versus* ROWLINSON.

THIS was a case reserved from the last *Lent* assizes for the county of *Stafford*.

It was an action in replevin, for taking the plaintiff's goods, cattle, &c.

The defendant avowed; first, for that he was seised in fee, of the *locus in quo*: and that the cattle were damage-feasant there. Secondly, that the defendant was seised in fee; and on 6th *April* 1760, demised to the plaintiff for one year from the 5th of the same month of *April*, at the yearly rent of 19l. 10s. payable half-yearly, on 10th *October* and 5th *April*: and that the plaintiff entered, and held under that demise till the 5th *April* 1761. That before the said 5th of *April*, to wit, on the 1st of *January* 1761, the plaintiff gave notice to the defendant, "that he would quit and deliver up possession of the premises on the said 5th of *April* 1761:" but he *did not quit*, pursuant to such notice; but *held over* till the 10th of *October* in the same year. That the yearly value of the premises was 19l. 10s. And so avows for 19l. 10s. being *double* the value of the premises for half a year ended upon the said 10th of *October* 1761. (a)

The plaintiff, in bar to the *first* part of the avowry, pleaded a demise from the defendant, of the *locus in quo*, for one year from the 5th of *April* 1760; and so from year to year, as long as both parties should please: under which demise, he rightfully put in his cattle, and placed his goods and chattels there; and the defendant wrongfully took them. And as to the *second* part of the avowry, he pleads the like demise; and traverses "that he gave

Friday, 25th
Jan. 1765.

[S. C. 1 Bl.
533.]

Parol notice
to quit where
there is no
instrument in
writing sufficient.

(a) Vid. 3 *Wilson*, 25, that such a notice would now² be bad as to quitting, though it is here adjudged good, to entitle the landlord to double the yearly value for the time the tenant holds over, by 4 G. 2. c. 28.; but the landlord's acceptance would make it good.

1765.
TIMMINS
v.
ROVLIN-
SON.

" notice to the defendant to quit and deliver up the possession of the said premises on the said 5th of April 1761," as is alledged in the said avowry.

The AVOWANT, by his replication to the first part of the plaintiff in replevin's plea in bar to the avowry, denies that he demised to the said plaintiff in replevin, in the manner therein mentioned: and issue was joined thereupon. And as to the *second* part of the said plea in bar, he takes issue upon the *traverse*.

The cause was tried, as above. And

It appeared in evidence, at the trial, that the plaintiff held the premises for one year, from the 5th of April 1760; and so from year to year, as long as both parties should please; but that such demise was only by *parol*: and that the notice proved to be given by the plaintiff to the defendant "to quit on the 5th of April 1761," was only a *parol* one, and not in writing.

A verdict was found for the plaintiff, on the first issue; and for the defendant, on the second issue (as to the notice to quit), subject to the opinion of this court, upon these questions—

1st. Whether the plaintiff was liable to pay double rent for not quitting, after having given a notice to do so, *by PAROL only*.

2dly. Whether, as the plaintiff held under a *parol demise*, as tenant from year to year, this is *such a holding as is* within the statute of 11 G. 2. c. 19. s. 18. so as to subject the plaintiff to *double rent*, for his not quitting after having given notice "that he would do so."

This case was first argued on *Tuesday* the 13th of *November* last, by Mr. *Ashurst* for the avowant, and Mr. *Stowe* for the tenant (the plaintiff in replevin;) and again now, by Mr. *Price* for the avowant, and Mr. Serjeant *Nares* for the tenant, the plaintiff in replevin.

1st Point.

For the defendant or avowant, cases were cited to prove that statutes ought to be construed *liberally*; and that the construction should be extended *beyond the words of the preamble*, in order to advance the remedy and suppress the mischief.

Here the particular mischief was the inconvenience to landlords when their tenants would not quit, after the landlord had agreed with *another* tenant.

[1605] The double yearly value under the act of 4 G. 2. c. 28.* is payable upon notice given *by the LANDLORD*; and must be *sued for*. The double rent under the 11 G. 2. c. 19. † is upon notice given *by the TENANT*; and may be *levied, sued for, or recovered*, in the same manner as the former rent.

* Sect. 1.

† Vide sect. 18.

Therefore this latter act means to remedy a substantive

mischiefe, arising from a *breach of faith* in the tenant. It is *not* a mere *mutual* remedy given by this statute, upon the *tenant's* notice as it was by the former, upon the *landlord's* notice.

The act of 8 *Ann.* c. 14. is also in favour of landlords.

This act of 11 *G. 2.* c. 19. is not confined to the case of those leases only, wherein the tenant has liberty to quit at the end of 7, 14, or 21 years: it is *general*, "in case † + V. Sect. 18. " *any* tenant or tenants shall give notice, &c."

The present case is a notice *by the tenant*. A landlord can not *oblige* his tenant to give the notice *in writing*: therefore notice *by parol* must be within the remedy intended. And here was *parol* notice given by the tenant, of quitting: yet the tenant did not quit.

2d Point. Whether this, being a lease *by parol*, be such a *holding* as is within 11 *G. 2.* c. 19. § 18.

This is clearly a lease and a holding within this act.

It is not necessary that a lease should be a *deed*. "*Lease*" is synonymous to "*demise*." *Litt.* § 57. They cited also 1 *Strange* 651. *Ryley v. Hicks*; and *Sheppard's Touchstone* of Common Assurances.

It may be objected, "that this being a *penal* statute, "it ought not to be extended by *intendment*."

But it is *pro bono publico*; and therefore shall be extended by equity. *Plowd.* 36. b. expressly. 2 *Inst.* 648, 649. (an exposition upon 2 *Ed.* 6. c. 13. of tithes;) where the case of *Heale v. Spratt* is cited: which was adjudged to be fraud and guile within that act; although he justly divided the tithes within the letter of it.

This is a *LEASE*, both within the words and meaning of this statute. The words are—"the premises by him, "her or them holden:" and it means to advance the re-

[1606]

For the plaintiff in replevin, it was insisted, that all 1st Point. acts of parliament relative to the same subject must be construed *together*: and it must be supposed, that the parliament had the former *in view*, when they made the latter.

The 11 *G. 2.* c. 19. was made *in pari materia* with 4 *G. 2.* c. 28. Therefore they must be considered together, as *one law* or one *system* of laws. The *title* of each is alike, very nearly.

The former act (4 *G. 2.*) requires notice *in writing*. Therefore, on the second act (11 *G. 2.*) the notice ought also to be *in writing*. The words of this latter act are—"at a time *mentioned* in such notice;" and "at the "time *CONTAINED* in such notice:" which words shew, that the parliament must have meant "that it should be "a notice *in writing*." The words—"shall from thence- "forward pay"—also shew this; because it amounts to

1765.

TIMMINS
V.

ROWLIN-
SON.

1765.
TIMMINS
v.
BOWLYN-
SON.

a new contract: it virtually makes a new demise, from the time of holding over; and gives the same remedy as for the old rent. Therefore it is right and reasonable that it should be in writing, as being liable to no incertainty.

Parol notices must be attended with very great inconvenience; and may be *extremely difficult to prove*.

Requiring a *written* notice would be better both for landlord and tenant: it would give the former a clearer proof; and make the latter more cautious.

To prove "that these two statutes must be construed *together*," they cited 1 *Ventr.* 246. and *Waltis v. Henson*, before Lord *Hurdwicke*, 24 Jan. 1740. and *Rex v. Lordale*, Hil. 31 G. 2. B. R.*

* V. ante,
pt. 4. vol. 1.
p. 447.
3d Point.

As to the 2d point—They inferred from the words in the preamble—"Landlords whose *tenants have power* to "determine their leases by giving notice to quit the "premises by them holden," that the legislature had in view *only* such tenants as have, by a clause frequently inserted in leases, an *express* power to quit, at the end of 7, 11, or 14 years, upon giving notice to their landlords.

[1607]

Lord MANSFIELD, upon the first argument, ordered it to stand for another; because it was a *new* question.

Uterius Concilium.

HIS LORDSHIP, after the second argument, declared, that he had no doubt of the true construction, on the former argument.

The rule that has been mentioned, of construing acts of parliament made *in pari materia*, is right: all of them ought to be considered as *one system*.

But on considering both these acts together, it will appear, that though the case intending to be provided against under the former act, is both inconvenient to the landlord, and unjust and vexatious in the tenant; yet on the latter act, the case is still *stronger* against the tenant, as being more vexatious, where he himself gives the notice and then departs from it.

And as it is notorious, that an infinite quantity of land is holden in this kingdom, *without* lease; therefore it is an extensive case, and proper to be remedied.

In the 4 G. 2. the provision was for those cases where the *landlord* gave the tenant notice to quit. This of the 11th of G. 2. provides for the case of the *TENANT's* giving his landlord the notice of his intention to quit, and not delivering up possession according to it. The title of the act is almost the same as the former: One is "for the more effectual preventing frauds committed "by tenants, and for the more easy recovery of rents,

" &c.:" the other, " for the more effectual securing the
" payment of rents, and preventing frauds by tenants."

1768.

TIMMINS
V.
ROWLIN-
SON.

There is no reason to confine this power given to
tenants by the latter act, of quitting their leases upon
notice, to *written notices*. The words of it are general:
this act does not say, that the notice shall be *in*
writing. The legislature were then considering the for-
mer act, which *was* tied down to a notice *in writing*,
to be given by the landlord: but they purposely left
it out here.

It is said, " that parol notice may be very difficult to
" prove." But the difficulty of *proof* of a parol notice is not
a sufficient answer: for here, the notice is in fact traversed
and proved.

It is clearly within the words; and it is also within the
meaning, and within the reason of the act; and within the
justice of the case.

[1608]

Mr. Justice WILMOT concurred; and was of the
same opinion, he said, at the first argument.

The 1st question is, whether the tenant's notice *must*
be *in writing*.

The 2d question is, whether this is such a tenant as to
be subject to pay a double rent for not quitting after he has
given the notice.

First The act of the 11th year of the late king is
penned differently from that of the 4th; and seems to
have been *designed* to lay a less restraint upon the notice
to be given by the tenant, of his intention to quit, than
the former act had laid upon the landlord, in obliging him
to give notice *in writing* to his tenant " to deliver pos-
" session."

This different penning will appear, if you compare the
acts together.

The former does not give double the *rent*, as the latter
does; but " double the yearly *VALUE* of the *estate*;" be
the *rent* what it will; (double the *rent* might not have been
an equivalent.) And for *that* reason, it was necessa-
ry that it should be recovered by *action*, and not by
distress.

The former is worded—" after demand made, and *no-*
tice in writing given." And the reason is much stron-
ger, for obliging the *landlord* to give notice *in writing*,
than for obliging the *tenant* to do so: for landlords gene-
rally *can* write; tenants, in the country, very seldom
can. And there are other good grounds for requiring the
landlord's notice to be in writing, which do not hold with
regard to the tenant's notice.

The ease or the difficulty of proving is just the same, be
it the one's notice, or the other's.

It has been said, that the expressions of " *mentioned in*

1765.

TIMMINS

v.

HOWLIN-

SON.

[1609]

"the notice," and "*contained in the notice*," shew that the legislature meant a notice in writing. Now the word "*mentioned*" is equivalent to "*contained*" in such notice. But neither of them prove that the notice must necessarily be *in writing*.

One notice is *expressly* required to be in writing: the other, *purposely* (I believe) *not* required to be in writing.

Secondly—As to the question whether *this class* of tenants be within the act of 11 G. 2. c. 19. Section the 18th.

I think them both within the *preamble*, and the *enacting* part of this section. I should *not* have *confined* it to the *preamble*, even if it *had* been so restrained as has been urged at the bar, when the *enacting* clause was *general*: but the *preamble* is *not* so restrained, as has been supposed; nor will the inference hold, that has been drawn from it.

[1 Wils. 259.]

In the country, leases at will, in the *strict* legal notion of a lease at will, being found extremely inconvenient, exist only notionally; and were succeeded by another species of contract, which was less inconvenient. At first, it was indeed settled to be for a year certain: and then, the landlord might turn the tenant out at the end of the year. It is now established, that if a tenant takes from year to year, *either* party must give a *reasonable* notice, (*b*) before the end of the year; though that *reasonable* notice *varies*, according to the custom of different counties.

• Sec. 11.

This practice, established by judges upon circuits, does make them "tenants having power to determine" their leases, by giving notice to quit," in the words of the *preamble*. * And it is immaterial, whether the lease be for one, or more years; or in writing, or not in writing. But the words of the *enacting* clause are much more large and liberal: the words there used are—"In case *any* tenant or tenants shall give notice of "his, her or their intention to quit the premises by him, "her or them holden, at a time *mentioned* in such notice; "and shall not accordingly deliver up the possession "thereof at the time in such notice contained: that then, "&c." It is, clearly, equally within the mischief intended to be remedied: and, I think it is within the *words* of the *preamble*. But, at least, it is within both the *words* and *meaning* of the *enacting* clause.

(a) It has been settled six months since this judgment, but before *Burrows* published these Reports; see 3 *Wilson*, 25.

Therefore I am of opinion, that the landlord must have the double rent. 1765.

Per † *Cur.*—Let the DEFENDANT have the *postea*, in order to enter up his judgment. † Mr. J. Denison and Mr. J. Yates were both of them absent.

PEART and Another *versus* WESTGARTH and Another.

UPON shewing cause against a MANDAMUS “to appoint four overseers for the whole parish of *Stanhope* in the county palatine of *Durham*,” the question was, whether the several districts within it were one *entire* parish, township and village, within the intent and meaning of the several statutes made for the relief of the poor; and for that purpose have had and of right ought to have one *joint* appointment of overseers of the poor, for the *joint* relief and maintenance of the poor in and throughout the parish: or, whether the said several districts, being divided into six separate constableries, constituted four *distinct* and *separate* townships or villages, within the intent and meaning of 13, 14 *Car. 2. c. 12. § 21.* [1610] Order of sessions for appointing overseers for a part of a parish, bad.

It was, by consent of the parties, tried upon a feigned issue at the last assizes at *Durham*: and a verdict was found for the plaintiffs (with 1s. damages and 40s. costs) subject to the opinion of this court upon the following case.

Case—That from 43 *Eliz.* to 9 *G. 1.* (1723) the parish of *Stanhope* had one *joint* appointment of overseers of the poor of the said parish; and during all that time, the poor of the said parish were *jointly* relieved and maintained by *entire* and *general* rates upon the *whole* parish. [See Doug. 339. 1 Durn. 375, 377. 3 Durn. 746. 4 Durn. 206, 270.]

During the time abovementioned, there were four churchwardens, and four overseers of the poor: which four overseers were respectively nominated out of each of the four quarters or districts within the said parish called *Forest* quarter, *Newlandside* quarter, *Park* quarter, and *Stanhope* quarter; viz. one out of each of these quarters: and in each quarter, there was one churchwarden and one of the said overseers who collected the poors rates in the quarter or district wherein they respectively resided; but the money collected by the several churchwardens and overseers was levied under one *entire* assessment upon the *whole* parish, and carried to one *general* fund, and was applied to the *joint* relief of all the poor of the said parish.

The parish is 20 miles in length, from east to west; and 8 miles, at a medium, in breadth. The *Park* quarter is one *distinct* constabulary; the *Forest* quarter, one; and the *Stanhope* quarter, one: and the *Newlandside* quarter consists of 3 constableries; but these three

1765.
PEARCE
V.
WEST-
GARTH.

overseers; one out of *each* quarter. Indeed it is *not expressly* stated, "that it is a *populous* parish." But this sufficiently appears by the *circumstances*: and it appears that it was so, at the *time* of making the act of 43 *Eliz.*

The present order of sessions was made 9 G. 1. for the separate divisions of this parish to maintain their own poor, *unless* cause was shewn by the constabulary of forest-quarter at the then next sessions. No cause was shewn: and they have acquiesced under that order, ever since; and have now maintained their own poor *separately* for forty years.

[*Ante*, 1612.] As to the cases mentioned on the other side—*Rex v. The justices of Middlesex*, relating to the inhabitants of *St. Pancras*, was for a *mandamus* to appoint overseers for the north division of *Kentish town*: but the *mandamus* was denied; because it appeared "that the parish *could* reap the benefit of the 43 *Eliz.*" And it did not appear, that the north division of *Kentish town*, was a township or vill. As to *Bradfield's* case—No order of sessions was made there, or any thing done to support a division. And, as to the *Wolsingham* case—It was given up without argument.

Therefore, there has been no judicial determination at all, as far as appears, upon this matter.

[*Post*. 1614.

acc.

1 *Sider.* acc.

1 *Sea-Cas.* 163.]

THE COURT, upon this first argument, thought the justices had no power to *divide* parishes, (to fitter parishes into pieces, as Mr. Justice WILMOR expressed himself:) and Lord MANSFIELD said he believed that the point of *policy* was as Mr. Walker said; namely, "that parishes should rather be larger than smaller than they are." It was ordered to stand for further argument.

Uterius Concilium.

It was now argued again, by Mr. Wedderburne, for the plaintiffs; and Mr. Clayton for the defendants.

[1614] Mr. Wedderburne enforced the arguments which had been urged by Mr. Walker; and observed that all along from 43 *Eliz.* to 9 G. 1. the parish had only one *joint* appointment for the *whole* parish: so that it was manifest, not only that they *could*, but that they actually *had* for many years reaped the benefit of 43 *Eliz.* And *no authority* for this division appears in the case. The truth is, that the rich part of the parish want to separate themselves from the poor part, and throw the burthen upon them.

Mr. Clayton, *contra*, enforced Mr. Dawson's arguments; and particularly that of the division having been acquiesced under for above forty years; and the annual appointments of overseers by two justices having been accordingly, ever since the year 1723.

Lord MANSFIELD said he had no doubt, upon the first argument.

The policy of this law of 13, 14 C. 2. was mistaken: it went upon a *wrong* principle. The divisions ought rather to be enlarged, than diminished.

As to the question itself—Consider, 1st. what was done: 2dly. upon what foundation?

It ought to appear “that there was an INABILITY in “the parish, to have the benefit of the act of 43 Eliz.” Now here, no such inability appears; but quite the contrary, for a great number of years: so that there is no foundation for the division.

The acquiescence under it was upon a false notion, “that “the sessions had such a power:” which they had not. And there is no inconvenience in setting right this wrong usage which has obtained for forty years.

In the case of *Kentish town*, all the judges held, “that “the foundation of such a division of a parish must be an “inability of having the benefit of 43 Eliz.”

Here, the foundation is wanting. Therefore judgment must be for the plaintiffs.

Mr. Justice WILMOT also thought, that the larger the circle, the better: therefore it would be more proper to enlarge than to lessen the divisions.

The statute of 13, 14 C. 2. goes upon this basis, “that “the parish is so large as that it can not have the benefit “of the 43 Eliz.” This, therefore, is a fact that ought to be quite clear and certain. Whereas, on the contrary, it appears in the present case; “that this parish “actually had that benefit from 1602 to 1723; above 120 “years.”

The sessions do not seem to have had any sort of power to make such an order: therefore their order is a mere nullity. It was not made upon any appeal; but upon a motion made on behalf of some of the quarters, and opposed by another.

The subsequent usage for forty years can not vary the right. For we can not presume, that “omnia rite acta sunt;” because we see that it was founded upon this order of sessions: and it does not appear that the parish is so large that it can not have the benefit of 43 Eliz.

Therefore they ought to appoint running overseers over the whole parish.

Per * Cur.

JUDGMENT for the PLAINTIFFS.

1765,
PEART
v.
WEST-
GARTM.

[1615]

* Mr Justice Denison and Mr. Justice Yates were both of them absent.

1765. *Rex versus Sir WILLIAM TRELAWNEY, Steward and*
 Tuesday, 29th Jan. 1765. *CAPITAL BURGESS of WEST LOE.*

Information
 quo warranto
 against a
 steward of a
 corporation
 for acting as a
 capital bur-
 gess refused.

A MOTION had been made for an information in nature of *quo warranto* against him, for acting as capital burgess, having been steward (a *higher* office, as was alledged,) *when elected* capital burgess; which higher office of steward was said to be *incompatible with*, and therefore rendered him *incapable* of being elected into the *lower* office of capital burgess.

On shewing cause now, it was (*inter alia*) alledged, that they were *not* incompatible: but *if* they were incompatible, it would be the *former* office that was vacated by the acceptance of the *latter*; and *not* the office which *was* last accepted.

[See 4 Burr.
 2964.
 2 Durn. 83.
 84.]

[1616]

Lord MANSFIELD went through the particular circumstances of the present case; and observed how insufficient the whole amount of them was. Here is no fact doubted; no opposition; no objection ever made. All the evidence that can be traced shews a consistent usage for 100 years back, "that the steward, if a capital burgess before, has *remained* a capital burgess." And in point of law, there is no incompatibility in the steward being a capital burgess. If he should be chosen mayor, it may then be a question "whether his acceptance of *that* office does not vacate his office of steward." It seems to me very strong, (though it is not now necessary to determine it,) that *if* these two offices of *steward* and capital burgess were incompatible, the acceptance of the latter would imply a *surrender* of the former.

Mr. Justice WILMOT had no doubt. Here is no question, either of law or fact. The fact is agreed "that, *being steward*, he was chosen capital burgess." And as to the law—There is no incompatibility, in *this* case.

* Cap. 18.

† Cap. 20.

The two acts of parliament (of 4, 5 W. & M.* and 9 Ann. †) relate to quite different objects; and are the reverse of each other. The former *restrains* the clerk of the crown in this court from exhibiting or filing informations *without leave* of the court in cases where all the king's subjects might, before the making of that act, have made use of his name *without* such leave. The latter *lets in every body*, who desires it, to make use of his name in prosecuting usurpers of franchises; whereas, before, *no subject* could have done so: but it provides, that *these* informations (as well as those for misdemeanors) must be under leave and discretion of the court. Therefore the court ought not to give such leave without sufficient reason.

He then entered into the circumstances of the case:

upon which he made (amongst others) the following remarks. Here appears to have been an usage for a whole century, "that both offices have actually been in the same person." The legality of this was never questioned, before: and it has been several years acquiesced in. The charter does not imply any incompatibility. The steward does not seem to be a part of this corporation.

Per * *Cur.* clearly and unanimously,
RULE DISCHARGED.

REX *versus* GRAINGER.

1765.
REX
v.
TRE-
LAWNEY.

* Mr. Justice
Denison and
Mr. Justice
Yates were
absent

[1617]

ON Tuesday 27th November 1765. Mr. Wallace moved to set aside the defendant's plea to an indictment; and that judgment might be entered against him by default; as the prosecutor had, by reason of this *dilatory* plea, lost the benefit of trial at the sittings after term.

Tuesday, 29th
Jan. 1765.

Dilatory plea
to an indict-
ment, must
have an af-
fidavit annex-
ed thereto.

His objection was, "that the plea is a dilatory one; and yet is not verified by affidavit; nor is any probable matter shewn to the court, to induce them to believe that the fact of it is true."

The plea was of *Michaelmas* Term 1765; and is in these words—"And the said John Grainger, who in and by the said indictment is called by the name and addition of John Grainger late of the parish of Kensington in the county of *Middlesex*, butcher, in his own person cometh; and having heard the indictment, he saith that at the time of taking the said indictment and long before, he the said John was and ever since hath been, and still is inhabiting, resident and commorant in the parish of *St. James Westminster*, in the county of *Middlesex* aforesaid; without this, that he the said John now is, or at the taking of the said indictment, or at any time before, was inhabiting, resident or commorant at the parish of *Kensington* in the county of *Middlesex*; and this he is ready to verify. For which reason, and because he the said John Grainger is not called, in the said indictment, John Grainger late of the parish of *St. James, Westminster*; he the said John prays judgment of the said indictment, and that the same be quashed."

Mr. Wallace relied on 4, 5 Ann. c. 16. § 11. which says that "no dilatory plea shall be received in any court of record, unless the party offering such plea, do, by affidavit, prove the truth thereof; or shew some probable matter to the court, to induce them to believe that the fact of such dilatory plea is true."

RULE to shew cause.

Mr. Ashurst now shewed cause, on behalf of the defen-

1765.
 HEX
 V.
 GRAINGER.
 [1618]

dant; and cited the 7th section of the abovementioned statute; and Mr. Justice *Foster's* book, p. 16. *Charles Kinloch's* case; where there was no affidavit.

Lord MANSFIELD—That was at the bar; it is not like the present case; nor does the 7th section of the act extend to this 11th. *It is usual* to annex affidavits to pleas of this sort, in the crown-office: and I do not see why they should not be annexed.

RULE MADE ABSOLUTE, to set aside the plea,* for want of an affidavit.

* N.B. They did not at all enter into the merits of the plea.

Friday, 1st
 Feb 1765.

[S. C. 1 Bl.
 535.]

A devise apparently for life, may be construed under circumstances to be a devise in fee.

[See also
 3 Wils. 414.
 5 Durn. 414.
 1 Bl. Rep.
 499.]
 3 Durn. 359.]

FROGMORTON, ex dimiss. BRAMSTONE, *versus* HOLYDAY et al.

THIS was a special case, upon an action of trespass and ejectment, from the last assizes for the town and county of the town of *Kingston upon Hull*.

Margaret Hasselwood, being seised in fee of the premises in question, by her will dated 28 October 1719, amongst other things, devised as follows—"As for my *worldly affairs and estate, &c.*—I do dispose thereof in manner following. Imprimis, I give, devise and bequeath unto my son *David Hasselwood* and his heirs (a) for ever, my *malt-kiln* standing and being in *Black Friar gate*—Item, I give, devise and bequeath unto my son *John Hasselwood*, all that house and garden now in the tenure and occupation of *Edward Gibson*, *muriner*, (a) charged and chargeable, nevertheless, with the payment of the sum of 50*l.* of lawful British money: which said sum of 50*l.* I give, devise and bequeath unto my daughter *Margaret Holyday*, payable and to be paid to her out of the yearly rents, issues and profits of the said house; to be paid unto and received by my said daughter *Margaret Holyday* yearly and every year, until the said sum of 50*l.* be fully paid and satisfied. And if the said *John Hasselwood* shall happen to die in his minority or before he comes to age, then I give, devise and bequeath the said house and garden unto my three daughters *Elizabeth Locking*, *Margaret Holyday*, and *Hannah Hasselwood*, equally, share and share alike." Then she gives small specific personal legacies, of money, silver, silvers, &c. and concludes thus—"All the rest and residue of my goods, chattles, rights, and credits, (not mentioning her

(a) The different pennings did not in this case make different constructions as it sometimes does; for which see 8 Vin. 134. pl. 35.

"real estate I give, devise and bequeath unto Mr. G. H. 1765.
" and E. L."

The testatrix soon afterwards died; leaving issue *David* her eldest son, and *John* her youngest son, and the three daughters abovementioned.

At the time of making and executing the said will, her son *David* was of the age of 23 years; and her son *John*, of the age of seven years. The premises in question, which were devised to *John*, were then of the yearly value of 10l.

The said *John* entered upon and was seised of the same until the time of his death; which happened in 1762.

In the life-time of *John*, the abovenamed *David*, (the eldest son and heir at law of the said *Margaret*), died intestate, leaving issue *David* his eldest son; who, by deed of bargain and sale inrolled, dated 20th Sept. 1758, conveyed the premises in question to *Stephen Bramstone* (the lessor of the plaintiff) in fee-simple.

The malkiln devised to *David* was, at the time he took possession of it, let at 10l. a year, and has been since sold for 220l. being the value thereof.

David was set up in the business of a grocer and tallow-chaudler, by *David Hasselwood* his father: who advanced to him, at different times, upwards of 500l. and also gave him a messuage and shop and staith, of the yearly value of 20l. and another messuage and garden of the yearly value of 12l. and by his will, dated 16th July 1716, devised to the said *David* his eldest son ten shillings, in full of all he might claim out of his estate, having provided for him in his life-time. And the said *David Hasselwood* the father did, by his said will, devise to *Margaret* his widow, (the present testatrix,) a freehold estate at *Cottingham* in the county of *York* for life; and after her decease, to the before mentioned *John* his son in fee: which estate, at that time, was of the yearly value of 40l. and he devised other estates to his said wife; some for life, and others in fee, and directed his said wife to bring up and educate all his said children, and find and provide them all manner of necessities at her own charge, during their respective minorities.

Upon the trial of this cause, a verdict was found for the plaintiff; subject to the opinion of this court, upon the following

Question—"Whether an estate for *life*, or in *fee*, " in the premises in question, passed to the abovenamed " *John Hasselwood* by the said will of *Margaret* his " mother."

It was first argued on Tuesday 20th November last,
Vol. III. A a

PROGMO-
TON
ex dimiss.
BRAM-
STONE,
V.
HOLYDAY.
[1619]

1783.
FROGMON-
TON
EX AMISS.
BRAM-
STONE,
V.
HOLYDAY.

by Mr. Wallace for the plaintiff, and Mr. Henthorn for the defendant; and again now, by Mr. Blackstone for the plaintiff, and Mr. Wedderburne for the defendant.

THE COUNSEL for the plaintiff insisted that John the second son took an estate for life only.

The words, in legal strictness, import an estate for life: and no intention appears to the contrary. The intention must be collected out of the words. *Cro. Car. 368. Spirt v. Bence.*

Collier's case, 6 Co. 16. a. proves, "that a charge of so much *per annum* does not give a fee." And the reason is, because the devisee may pay it out of the profits. It is true, wherever the devisee may suffer, it makes a fee. But here, the devisee could not be a loser: for the charge is not upon him, but upon the estate, and is payable out of the profits. Now this estate being 10l. *per annum*, a charge of 50l. would have been discharged in about five years: consequently, here is no possibility of a loss. Therefore the case of *Read v. Hatton* in 2 Mod. 25. was not, they said, against them: for, there was a possibility of loss. And there is no case substantively determined on an introductory clause only.

No inference can be drawn from the contingency of John's dying under twenty-one: for in that event, the three daughters were to take; who were not his heirs at law. So that it is not at all similar to the case of *Purfoy v. Rogers*, nor affected by the note at the end of that case, in 2 Saunders 388. That note itself is only the opinion of the reporter. There the devise was—"I give my inheritances, &c.: and if he die before he come to the age of twenty-one, then I give my inheritances &c. to my heirs for ever." There, the substitution was "to the testator's own right heirs;" who would have taken without that clause: but here, the substitution is to third persons. Therefore John had a life-estate only. And so it appears, by *Comyns* 353. *Fowler v. Blackwell et al.* in C. B.

The testatrix might, with good reason, give a fee to the eldest son, of twenty-three years old; and only a life-estate to her younger son, of seven years old: the savings during his infancy might make this devise equal to his brother's. This is a devise "to John" in general, without adding any particular limitation, and there is no reason to suppose it to be intended any more than for his life.

[1621] THE COUNSEL for the defendant argued this to be a fee in John, by the apparent intention of the testatrix.

Any charge of a gross sum gives a fee: so does every

annual payment. So is *Moore* 650. And this is a charge of a greater value, than can probably leave any benefit to the devisee.

Collier's case only proves, that where it is payable out of the profits, it is only a life-estate. But this is a charge of a great proportionable value. The devisee can receive nothing during five years at least; whilst the 50l. is paying off; and there is a strong improbability of his being at all a gainer by the devise. Therefore it must be construed a fee. It is a principle, "that the devisee must be meant to be benefited;" it is not enough, "that he probably can be no loser." *Read v. Hatton*, 2 Mod. 25, 26. was cited, as a proof of this: and as shewing that the benefit to the devisee is the spirit of the rule. But there was an event in which he must have been a loser; namely, that of his mother's living till he came of age, and then his own death happened before he could have received 50l. out of the profits.

Here was a mother of several children, without partiality to any of them. She gives a fee to the first; and certainly intended the same benefit to the second son.

The devise over to her three daughters,---"if John dies before twenty-one"---is an argument of the intention of the testatrix. Why should this clause of restriction to dying under twenty-one be added, if she meant only a life-estate? And if he had died before the end of the five years her daughter *Margaret Holyday* would not have reaped the fruit of the 50l. legacy; though her mother certainly meant that she should. In this respect, it is within the reason of the case of *Baddeley v. Lappingwell** in Trinity Term last; where if *Sarah Borchum* had not taken an estate in fee, the annuity to her sister might have failed. * V. ante, p. 1542, 1543.

The testatrix professes to dispose of all her worldly estate; and considers the residue as consisting of personal estate ONLY. These words "all her worldly estate" shew her intention to dispose of the inheritance. *Ibbetson v. Beckwith*, *Forrester* 157, 160. In *Comyns* 331. *Scot v. Alberry*—A devise "to my cousin *Thomas Scrape*, of all my lands in *Waltham-Abbey*, with all other my estate whatsoever and wheresoever,"---was holden to comprehend "all that he had, real or personal." [Post. 1625. and see 1 Vez. 227. *Forrester*, 2x4. *Ld. Raym.* 1326. 3 Wils. 414.]

And there is no case negatively determined, "that this expressing the payment to be out of the rents and profits does not admit of its being the testator's intention to give an estate in fee." The court must judge upon the circumstances: and the circumstances of this case shew, that a fee was intended.

THE COUNSEL for the plaintiff replied,

1765.
FROGMOR-
TON
ex dimiss.
BRAM-
STONE.
v.
HOLYDAY.

FROM MOR-
TON
ex dimiss.
GRAM-
STONE,
v.
HOLYDAY.

possibility of loss. It is not necessary, that it should be a *certain* benefit: a probable chance of benefit is sufficient.

In the case of *Read v. Halton*, there was a possibility of loss: and the annuity to the devisee's sisters was for life.

As to *Scott v. Alberry*—It does not apply to the present case; because the words there are so very strong—“all my estate whatsoever and wheresoever.”

As to the charge of 50l.—It is settled, that if the charge is payable out of the rents and profits, it does not give a fee. The present case is a valuable and beneficial devise, upon the *balance* of the rents and the charge: and therefore it shall not be construed to carry a fee.

As to the devise over to the three daughters, in case of *John's* dying before twenty-one—if this clause had not been added, it would, in that case, have gone to the elder brother (*John's* heir at law:) whereas the testatrix meant it for *other* persons, and *not* for the heir at law; and therefore *this* foundation of her intention to give a fee to *John*, entirely fails. And no intendment can be drawn, but from the words of the will.

LORD MANSFIELD—The testator's intention must be taken and collected from the *whole* will: and it must prevail, if consistent with law.* *Coryton v. Hellier* was a construction taken from *all* the parts of the will considered together, to imply the usual qualification “if he *live so long*,” after the limitation of a term for 99 years; which had been omitted by the negligence and inaccuracy of the writer, contrary to the manifest intent.

The question is, “whether *John Hasselwood* took an estate for life, or in fee, under this will.”

There are *no* words of limitation added to the devise to him. Many people do not know what words of limitation are necessary to be added to devises of land, any more than to bequests of personal estate. If nothing else appears, the devise must be construed according to *law*; and the devisee, *without* words of limitation, can take an estate for life only.

Here are many other clauses in this will, from which, taken all together, the intention of the testatrix may be collected.

She has declared, that she did not mean to die intestate, as to *any* part of her real estate. She has specifically named *each* part of it; and her sweeping residuary clause does not mention her *real* estate. Therefore she thought she had fully disposed of *that* before: and consequently, she meant this devise to her son *John* to be a devise in fee. Then she charged *this* devise with 50l. Let the

* 10th Aug.
1745, before
Lord Hard-
wicke, in
Chancery,
post. 1631,

[1623]

Ver. 40 per Lord Hard-
wicke 759. Law
55/1235. 37/1359.
22 295.

(See Forrest,
157.)

[8 Durn. 501.]

sum charged upon a devise be ever so small, it shall give a fee; but if it be made payable out of the annual profits, it is otherwise. This therefore is a middle case. For, here, John was but seven years old; and she appoints him guardians during his minority: therefore he did not want the whole profits. "If he should die under twenty-one," there is a devise over to the three daughters of the testatrix. This shews her intention to give a fee. For if he lived to twenty-one, he might then dispose of it himself; if he died before, he could not; and then she disposes of it.

If John was barely to take an estate for life, the time of his death must be immaterial to the devise over. But limiting it over, only upon the contingency of his dying in his minority, shews that she intended to give him an absolute estate in fee, which he might dispose of if he came of age: and unless he lived to be of age, (when he might dispose of it,) she meant it should go to her daughters.

A question applicable to this part of the argument was pleaded in the days of ancient Rome, by *Scævola* and *Crossus*, in the famous cause between *Curius* and *Coponius*; and much agitated in modern times, in the courts of Westminster-hall, in the case of *Jones* and *Westcombe*.

A man, taking for granted that his wife was with child, devised his estate to the child his wife was en-
scent of: and if such child died under age, then he devised it over. The woman was not with child. The question was, "whether the devisee over should take."

The *Roman* tribunals, at once, and the *English*, at last, † finally determined, that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was intitled.

† In *Jones v. Westcomb*, it came before Lord *Harcourt* upon a bill for an account of the personal estate. And there were several questions; particularly, "whether the surplus was disposed of or not." The case is reported in *Proceedings in Chancery*, 245 in *Equity Cases*, abridged, and *Reports in Equity*, called *Gilbert's*, 74. The deeds and writings, as to the real estate, were ordered to be brought into court.

In *Trinity Term* 1738, the case came on, for the opinion of the court of *King's Bench*, upon an ejectment brought for the leasehold estate: and the court gave judgment for the wife, to whom one-third was devised over.

1767.
FROGMOR-
TON,
EX DINIS.
HEAM-
STONE,
V.
HOLYDAY.

* Tully de
Oratore, lib.
1. fo. 175.

1621
Oratio pro
Cæcina.

1765.

FROGMOR-
TON.
ex dimiss.
BRAM-
STONE,
v.
HOLYDAY.

An ejectment was afterwards brought in the *Common Pleas*, by the representatives of the wife, and two sisters, devisees, for the *freehold* estate. It came on to trial before Lord Chief Justice *Eyre*; and a case was made. This case was several times argued in the *Common Pleas*. The 13th of February 1741, the opinion of the court was "that the devise "over never took effect." Judgment for the plaintiffs, for two-thirds only.

Afterwards, another ejectment was brought for the *freehold*, in the *King's Bench*: and the judgment of the court was for the devise over. The first case was *Jones v. Westcomb*; the second, *Andrews*, on the demise of *Jones v. Fulham* and others: the third, *Roe*, on the demise of *Fulham v. Weket*; the fourth, *Gullicer*, on the demise of *Fulham, v. Weket*, in the *King's Bench*, Mich. 19 G. 2. And Lord Chief Justice *Lee*, in delivering the opinion of the court, mentioned, as one reason of their opinion, "that the intent of the testator was apparent and "express that the estate should *not* descend; and that "the contingency was *not* a *condition precedent*; but "a *limitation* preceding the estate to the wife."

The argument holds equally, from a limitation over, "if the first taker dies in his minority," to infer that he was intended to have the absolute property if he attained his majority.

[1625] This is a family provision for all her children; without hampering them with intails and limitations. There could be no intention to make a difference between the two sons.

Therefore sufficient appears upon the face of the will, to shew that the intention of the maker of it was, "that "John should have the estate, UNLESS he should die in "his minority."

[Vaugh. 269.] Mr. Justice WILMOT---Here is such an *intention* clearly manifested by the will. The statute only requires a will in writing; but requires no technical words. Therefore if by *sound* (not indeed arbitrary) construction, it appears that the *intention* was "to devise a fee," it is immaterial what *words* are made use of. And all the circumstances and clauses are to be united and taken together, in order to *collect* this intention.

[See ante, 1621. Forrest. 187. acc. 3 Wils. 149. acc. and 8 Burn. 501.] Now upon this will, the intention does sufficiently appear. The introductory clause is very material. It shews the object of her consideration to be her *whole worldly estate*: and it is much the same as if it was repeated in *each* clause.

She had two sons and three daughters. She meant to provide for them all. She meant to give the same value

1703, 1

CHAFFMAN

V. V

BROWN

question, by his last will dated 4th of May 1694, devised the same to his wife for life: and after her death to his brother *Thomas Brown*, until such time as *William* the eldest son of his brother *Reginald Brown* should attain the age of twenty-four; and from and after the said *William's* attaining that age, he gave the same to his said nephew *William Brown* and his assigns for and during the term of his natural life; and from and after his death, then to the first son of the body of the said *William Brown*, lawfully begotten or to be begotten; and to the heirs male of the body of such first son, lawfully to be begotten; and for want of such issue, then to the second, third, fourth, fifth, and every other son and sons of the said *William*, according to their seniority; and to the heirs male of their bodies, the eldest of the said sons of the said *William Brown* and the heirs male of his body, always to be preferred before the younger and his heirs male; and for want of such issue of the body

trust executory, then the second son of *Reginald* would have taken an estate tail, even though the words that seem to have been accidentally omitted had been supplied; as contended for by the plaintiff's counsel in page 1630. This is clear from the cases of *Humberston v. Humberston*, 1 P. Wms. 232. 2 Vern. 739; and *Prentiss v. Ch. 455*, which case has been often approved of, 1 Atk. 393; 2 Vez. 568.

It has been a notion entertained for some years by the judges of the B. R. as well before as since this case; that there is no difference between the devise of a trust and of a legal estate, and that all trusts are executory according to the determination in *Bagshaw v. Spencer*, 1 Collec. Jurid. 375; and therefore there is no solid distinction between a trust executed, and a trust executory: this appears in 2 Burr. 1108. and many other late cases in B. R.; and if this notion be well founded, then not only the court of B. R., but the House of Lords spent a great deal of time unnecessarily, in considering this case; for at all events, the second son of *Reginald* must be tenant in tail, and it was trifling to argue whether the court should supply the omission or not; for if not, it was clear and admitted that the second son of *Reginald* was tenant in tail male, and if the words contended to be supplied, had been in the will, and there is no difference between the devise of a legal estate, and a trust executory, it is equally clear, from the authorities already referred to, that he would have been tenant in tail male in that case also.

of the said *William Brown*, then to the heirs male of his said brother *Reginald Brown*, for and during the term of his natural life; and after the death of the said second son of his said brother *Reginald Brown*, then to the first son of the body of such second son of his said brother *Reginald Brown*, lawfully begotten or to be begotten, and to the heirs male of the body of such second son, lawfully to be begotten; and for default of such issue, to the third, fourth, fifth, and every other son or sons of the said second son of the said *Reginald* (according to their seniority) and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *Reginald*; lawfully to be begotten; the eldest of the said son and sons and their several heirs male according to the seniority and priority of birth, to be preferred before the younger of the said sons and their heirs male; and for want of such issue, then to the eldest or next son or sons of the said *Reginald Brown* for the time being, for the term of his natural life; and after his or their deaths, to the heirs male of the body of such eldest and next son of his brother *Reginald*; and for want of such issue, then to the first son of his brother *Samuel Brown*, for and during the term of his natural life; and from and after the death of such first son of his brother *Samuel Brown*, then to the first son of the body of such first son of the said *Samuel Brown*, lawfully begotten or to be begotten, and to the heirs male of the body of such first son of the said *Samuel Brown* lawfully begotten; and for want of such issue, then to the second, third, fourth, fifth, and every other sons of the eldest son of *Samuel*, in tail male; and for want of such issue, then to the second, third, fourth, fifth, and each other son and sons of *Samuel* for their respective lives; and after their respective deaths, to their respective sons, in tail male; and for want of such issue, then to his own right heirs for ever. Then comes this article, "and I do declare that the reason of my settling and limiting my said messuages, lands, and hereditaments as aforesaid, is because I desire to have the same continue in my name and blood, so long as it should please God to permit the same." On the 1st of August 1684, *Joshua Brown* the testator died seized of the premises without any issue; leaving *Ann* his widow; his three brothers *Thomas*, *Reginald*, and *Samuel*; and his nephew *William Brown*, the only son of the said *Reginald* at the time of the testator's death and also at the time of making his will; and who was born on 29th March 1682.

Upon the testator's death, *Ann* the widow entered; and so did *Thomas* his brother; (on their respective

1765
CHAPMAN
V.
BROWN.

[1627]

1765.
CHAPMAN
v.
BROWN.

parts devised to them :) and on 29th March 1706, the nephew *William* having attained his age of twenty-four years, he also entered upon the tenements devised to him.

After the death of *Joshua* the testator, but during the life of *William* his nephew, *Reginald* the testator's brother had issue a second son, namely *THOMAS BROWN*; who was born 13th of March 1695: and on 16th of January 1696, *Reginald* died, leaving issue the said *William* and *Thomas*, and had no other sons.

[1628] On 12th of January 1712, *Ann* the widow died; and *William*, the first son of *Reginald*, entered upon the premises; and died seised thereof, on 20th of December 1722; leaving issue *ISABELLA*, now the wife *Richard Oliver* the plaintiff. Upon his death, *THOMAS* his brother (the second son of *Reginald*) entered; and in 1727, 1G. 2. obtained an act of parliament to enable him to grant building-leases of the premises in question; having then a son named *Reginald*, and a daughter, both under age: this *Reginald* was born 4th October 1718, and was the only issue male of *Thomas*; and died 26th April 1736, without issue and unmarried, and under the age of twenty-one.

In 1747, a common recovery was suffered of the premises, by *Thomas Brown*, who was the vouchee: which, by indentures of bargain and sale and of release, dated the 1st and 2d of April in the same year, was declared and agreed by all the parties to the said indenture to be and enure to the use and behoof of the said *Thomas Brown* his heirs and assigns for ever, and to or for no other use, intent, or purpose whatsoever.

Thomas Brown, being so seised, on the 5th of June 1762, made his will, whereby he devised the premises in question (after the death of *Margaret* his wife and *Sarah Barlow* [now *Mason*] his daughter,) to his grandson *John Barlow* his heirs and assigns for ever; and on the 7th of November in the same year, died; leaving the defendant *Sarah Mason*, the wife of the defendant *Jesson Mason*, his daughter and heir at law.

Thomas and *Samuel Brown*, the brothers of *Joshua* the original testator, died without any issue.

ISABELLA OLIVER, the plaintiff, is heir at law of *WILLIAM BROWN*, the first son of *Reginald Brown*; and is also heir at law of *Joshua Brown*, the original testator.

The defendant, *Sarah Mason*, is heir at law of *Thomas Brown*, the second son of the said *Reginald*.

The following PEDIGREE will give a clearer conception about the parties.

1765.
CHAPMAN
V.
BROWN.

JOSHUA BROWN,
the testator, died
on 1st Aug. 1694;
leaving three bro-
thers and one ne-
phew (*William*.)

REGINALD,
died 16th Jan.
1696; and left
issue—

THOMAS,
died on 19th Jan.
1714. S. P.

SAMUEL,
died without
issue. S. P.

WILLIAM BROWN
born 29th March 1682;
died 20th Decem. 1722.

He left
only one daughter

ISABELLA,
the wife of
Richard Oliver,
lessor of the
plaintiff.

REGINALD,
born 4th Oct. 1718;
died 26th Apr. 1756.
S. P.

THOMAS BROWN
born 13th March 1695;
died 7th Novem. 1762.

He made a will;
and had issue—

SARAH
Wife of *Jason*
Mason, now liv-
ing; one of the
defendants.

THE QUESTION was “ whether **THOMAS**, the second son
“ of *Reginald* (which *Thomas* was not born till after the
“ death of the testator *Joshua Brown*,) took an estate
“ tail under *Joshua Brown*’s will, or only an estate for
“ life.”

On the part of the plaintiff, it was insisted to be an
estate for *life only*; on the part of the defendants an estate
tail.

Mr. Wedderburne argued for the former: *Mr. Wallace*
for the latter.

The substance of the arguments on either side amount-
ed to the general effect following.

THE PLAINTIFF’S counsel argued, from the whole
scope of the will and particularly from the testator’s ex-
press declaration “ that the *reason* of his settling and limit-
“ ing his estate in the manner he had done, was *because*
“ he desired to have the same *continue* in his name and
“ blood,” and likewise from the express words, “ for and
“ during the *term of his natural life*,” that the manifest IN-
TENTION of the testator *Joshua Brown* was to give to the
second son of his brother *Reginald* an estate for *life only*;
and to make *all* the sons (either born or unborn) of his
brother *Reginald*,) and of his brother *Samuel* (after his
brother *Reginald*) tenants for *life successively*; with remain-
ders in tail, to the first and every other sons of such re-
spective tenants for life.

An estate for life may be limited to a person unborn, as

1765.
CHAPMAN

V

BROWN

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BROWN

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vs.

BROWN

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vs.

BROWN

the first taker. And here, this estate first given to the second son (not then born) of his brother *Reginald* is expressed to be an estate for life: and no words of limitation were meant, or can with any propriety of construction be applied to the second son of *Reginald*; and consequently, none that can operate so as to enlarge the estate for life expressly devised to him.

It must be confessed, that there is an inaccuracy or confusion in the wording of the devise, that is to take place immediately after the death of *Reginald's* second son. The words are "and from and after the death of the said second son of my said brother *Reginald Brown*; then to the first son of the body of such second son of my said brother *Reginald Brown*, and to the heirs male of the body of such second son; and for default of such issue, to the third, fourth, fifth, and every other younger son or sons of the said second son of my said brother *Reginald Brown*, and to the heirs male of the bodies of the said third, fourth, fifth, and other sons of the said second son of the said *Reginald Brown*."

[3 Vez. 120.]

But there can be no manner of doubt, that this is owing to a mere accidental omission in transcribing the fair copy of this will from the original rough draught of it. It is evident, that a line is inadvertently left out: And it is most clear, what that line must have been. The devise immediately after the death of *Reginald's* second son is "to the first son of such second son's body, and to the heirs male of the body of such"—Thus far the transcriber copied the draught right. But here he has plainly omitted the following words—"first son lawfully to be begotten; and for want of such issue, then to the second son of the body of such second son of my said brother *Reginald Brown* lawfully to be begotten, and to the heirs male of the body of such"—If these words had been inserted, the clause had been quite clear, sensible, and methodical. By supplying the omission of them, the limitation in favour of *Reginald's* second son and his descendants will be precisely the same as the testator had before expressly made with regard to *Reginald's* first son and his descendants: which must have been the testator's intention, and appears beyond doubt, upon fairly considering the will, to have been so. He certainly intended to give no estate tail, till he came down to his grandchildren. And if these omitted words are supplied, the second son intended by the will is not the second son of *Reginald*, but the second son of the second son of *Reginald's* not son, but grandson to *Reginald Brown*: which is agreeable to the testator's intention "to limit his estate in such manner to the several descendants of the then unborn son of his brother *Reginald*, in the like manner as he had be-

[200]

"if so limited to those of *Reginald's* first son, which first son was then born." And to prove that the court might supply this omission, the case of *Coryton v. Hellier* was cited; where the words "if Sir John Coryton shall so long live," were supplied. But whether this omission can or can not be supplied, yet still it shews that the "second son" meant in this clause could not be *Thomas*, the second son of *Reginald*; for the very next limitation, to take place in failure of the issue of that second son, is "to the third son of *Reginald's* second son." Now there could be no failure of the issue of the person who had a third son alive. The event therefore which the testator had in contemplation, and in which event he intended that this third son should take, could not be a failure of the issue of the FATHER of that third son; but of some other person concerning whom the questionable words "second son" must be understood and to whom they must relate.

On the part of the plaintiff, it was further observed, that *Thomas Brown*, the second son of *Reginald*, had himself decided the present question, by applying for and procuring an act of parliament, wherein he is, upon his own suggestion, recited to be tenant for life, with remainder to his first and other sons in tail male successively. His petition for this private act, and the recital in it "that the devise to him was only for and during the term of his natural life," is a bar to him and those who claim under him, and precludes them from claiming as tenants in tail. And it was said, that Lord *Hardwicke* had solemnly declared so, very lately, in the House of Lords, in Sir *James Mackenzie's* case.

Note—This private act of parliament recites the will, as if it had really been as Mr. *Wedderburn* now supposed that it was meant to have been; and as if it went on, to give an estate in tail male to all and every of the sons of the second son of *Reginald*; and proceeds upon a supposition "that *Thomas*, the second son of *Reginald*, was tenant for life."

THE COUNSEL for the DEFENDANTS laid it down as an established rule of law, "that if a devise be to one for life, and afterwards a limitation, either immediate or mediate, to the heirs of his body, the devisee takes an estate tail."

Now here the devise is "to the second son of *Reginald Brown*, for life; and after his decease, to the first son of his body and the heirs male of the body of such second son."

This is a clear estate tail therefore in the second son of *Reginald Brown*. And the inserting a limitation "to the first son of such second son" must be understood as

1765:

CHAPMAN
V.

BROWN.

In Chan-
cery, temp.
Lord Hard-
wicke, 10th
Aug. 1743.

[1632]

1765.
CHAPMAN
v.
BROWN.

only directing the order of succession according to the laws of primogeniture and the ordinary course of succession; not as a *designatio personæ*: for the word, "son", in this place, a *nomen collectivum*. Nor was this unborn first son of an unborn father (as the second son of *Reginald* then was) capable of taking as a purchaser; because a devise "to the first son of a person unborn" is too remote to take effect by way of purchase: and then the case is no more than a devise "to one for life, and to the heirs male of his body;" which is, unquestionably, an estate tail.

As to the INTENTION of the testator—Even supposing it to have been clearly what has been contended for, on the other side; and supposing (though not admitting) "that the imagined omission in the will might be supplied by construction;" yet that intension could not take effect: for it is a limitation of a possibility upon a possibility; and manifestly tends to a perpetuity, by a suspension of the inheritance from vesting, and consequently rendering the estate unalienable for a longer time than the policy of the law allows; which has not yet been permitted to last longer than the compass of a life or lives in being, and one and twenty years beyond.

Though the limitations to the issue male of unborn sons can not vest in them as purchasers, yet they need not be totally rejected. They shew the testator's intention "that such issue should succeed to the estate;" and the only way for that intent to take place, is, by construing the unborn sons of *Reginald* himself to be tenants in tail male; and then their issue will inherit. Whereas, the construction contended for by the plaintiff would totally preclude them from taking, and defeat the intension of the testator "that the estate should continue in his name and blood." The exposition of a will should be such as will best serve to effectuate the general intent of the testator; and whenever a court supplies, by construction, any seeming defect in the language, it is always in order to support, not to defeat the testator's intention: whereas if the supposed omission in the present will were to be supplied by construction, in the manner proposed on the part of the plaintiff, it would be only for the purpose of rejecting it the next moment, as void, and defeating the general intention of the testator.

As to the ACT of PARLIAMENT—It can not vary the real rights of the parties, with respect to persons not claiming under it. It could not make any alteration in the limitations of the testator's will. It was solely intended to protect, in all events, the persons who should become lessees, upon the terms of rebuilding and laying out their money, upon

[1 P. Wms.,
332. acc.]

[1633]

the faith of it. It can not affect a question of right between the claimants under *Joshua Brown's* will.

1765.

CHAPMAN
V.
BROWN.

On the part of the defendants, were cited the cases of *Coulson and Coulson*, the Duke of *Marlborough* and Lord *Godolphin*, *Hopkins and Hopkins* (*Forrester* 44.) and *Robinson v. Robinson* (ante 38.)

Reply—

As to the limitation “to the heirs of the body of the second son of *Reginald*,” which, uniting (as they say) with the former devise “to the said second son, for his life,” enlarges his life-estate into an estate-tail.—The answer is, that here is no such limitation: none was meant, nor can any words of limitation be with any propriety applied to the second son of *Reginald*, so as to enlarge his life-estate.

They have argued, that though the law will not permit the unborn issue of an unborn ancestor to take that very same estate which the testator intended to give them; yet, in order to effectuate, as far as may be, the testator's intention, it will give their ancestor a larger estate than was intended for him; namely, an estate tail (under which his issue may take,) instead of a life-estate.

Answer. This construction would be ineffectual to attain the end proposed: because the tenant in tail would thereby have it in his power to defeat the order of succession. (b) And if the policy of the law will not allow the sons of *Thomas* (*Reginald's* second son, unborn when the will was made,) to take that estate which the testator designed they should take, it affords no reason for giving to their father an estate which the testator certainly did not design that he should take: and so, by a disposition which the testator never meant nor thought of, put it in his power to disinherit his issue, and frustrate the testator's declared wish and desire.

THE COURT (namely, Lord MANSFIELD and Mr. Justice WILMOT, the other two judges being absent,) held that *Thomas* the second son of *Reginald* took an estate-tail.

They could not insert the limitations which the plaintiff's counsel supposed to be left out: and as the will now stood, there was no question in the case. [1634]

But if the omitted limitations could have been supplied by construction, they thought the unborn sons of an unborn son could not have taken; and that, to effectuate the general intention of the testator, the word

(b) This is a strong reason though over-ruled; and *1 Burr. 38.* is an authority for over-ruling it.

THIS was the substance of their general opinion. Their particular expressions were somewhat to the following effect.

[See 2 Ves.
jun. 702.
4 Ves. 311.
Doug. 78.
1 Durn. 351.]

LORD MANSFIELD—A court of justice may construe a will; and, from what is expressed, necessarily *imply* an intent not particularly specified in words; but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, *add* to a will, or *supply* the omissions.

LORD HARDWICKE, though generally liberal in construing the intent of testators, would *not* supply a *contingency omitted*, in the most favourable case that could exist. A mother devised her real and personal estate to her daughter (who was an only child;) “and *if* she die before she “is of age to dispose thereof,” then devised it over. The daughter lived to be married; and died, leaving a daughter between twenty and twenty-one. LORD HARDWICKE decreed for the devisee over, as to the *real estate*.*

* *Bellasis v. Urthwaite and others*, 11th Feb. 1797-8 (c)

But *if* words are rejected, or supplied by construction, it must always be in *support* of the manifest intent.

Here, adding the words would *defeat* the general intent: which certainly was “that the issue male of the “second son of *Reginald* should take, *before* it went to “the others in remainder.” But if the words were added, the limitation, by the rules of law, would be *void*.(d) A *possibility* cannot be devised *upon* a possibility. The *intent* cannot be effectuated, *unless* the second son of *Reginald* has an estate-tail.

The blunder of expression is here *favourable* to the

(c) S. C. 1 *Atk.* 426. But there are other words in the state of the case there, shewing the testator's intention that it should go over notwithstanding the daughter's marriage.

(d) See 16 *Vin.* 461. pl. 2. b.; and *vid.* 3 *Co.* 51. a. that if a lease be made for life, remainder to the right heirs of J. S. if there be no such person as J. S. born at the time of the limitation of the remainder, it is void: and that applies to the present case so far as to prove that a devise to the second son of *Reginald* would have been a void devise to him as a purchaser, because *Reginald* had no second son at the time of the devise, or even at his (the testator's) death; but there is another reason for it, that it was going nearer to a perpetuity than the law will admit of. The expression used by the reporter is wrong: he means that a remainder can not be devised upon a possibility of a possibility. *Vid.* 16 *Vin.* 461. pl. 2. b. and 3 *Lewin*, 410.

real meaning; and therefore cannot be supplied by construction: the constant object of which is, "to attain the intent." For *this purpose*, words of limitation shall operate as words of purchase; implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest. But *here*, to supply the words omitted by mistake or blunder, would introduce a *blunder in law*, and defeat the testator's general view and intention. As the words stand, the second son of *Reginald* took an *estate-tail*. The *intent* of the testator cannot be answered, but by giving him an estate-tail. Therefore the literal construction is most agreeable to the intent, and must prevail.

The private act of parliament cannot affect *this question*.

Mr. Justice WILMOT—The question is, what this testator *intended*? and whether we can give it effect, in *part*?

He intended it to remain in his name and blood. Two of his brothers are dead without issue.

At the time of the testator's death, *William* the first son of *Reginald* was born: *Thomas*, the second, was not. He certainly meant the *same* estate to *Thomas* as to *William*. But that intention *cannot take effect*, according to the rules of law: you cannot limit a *non-entity upon a non-entity* (e) a *possibility upon a possibility* (f). It was necessary that the second son should be tenant in tail, in order to give the intention of the testator an effect. If the devise to the son of *Reginald's* second son should be a nullity, the general heirs at law of the testator would take, though never so many heirs male from *Reginald* should be living. Let his intention therefore take place, *as far as it can go*: but it can go no further.

The clause of his name and blood is, in effect, saying "that the blood of *Thomas* shall inherit, before it goes to his daughters."

(e) Qu. If the persons unborn be sons, even then it hath been determined that the second cannot take, 6 *Durnf.* 613.

(f) That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself, but the contrary. Rule given by Lord *Popham*, in the rector of *Chadlington's* case, looks like a reason of art, but in truth has no kind of reason in it, and that rule has been often denied in *Westminster Hall*. 3 *Ch. Cap.* 29.

1765. Besides, how can we *make* wills, and insert words *arbitrarily* and by *conjecture*? Words in a will are to be construed as words of *limitation*, or as words of *purchase*, as they will *best effectuate* the intention of the testator: whereas the correcting this blunder (if it be one) must render the will *abortive*; and *disappoint* the intention of the testator, to a very high degree.

As to the act of parliament—It is nothing at all: it is only to empower him to make building-leases: and was intended for the security of the purchasers. The will is there recited, different from what it really is. (g)

[1636] This is clearly an estate-TAIL. And therefore
Per Cur. unanimously—

JUDGMENT must be for the DEFENDANT.

On the 26th of February 1767, this judgment was AFFIRMED by the LORDS; agreeably to the *unanimous* opinion of the judges, delivered by Lord Chief Baron Parker.

REX versus JOSEPH HALL.

Commitment as a vagrant for deserting a family, must state that they were chargeable, and be for a limited time. THE defendant was brought up by *habeas corpus*, from Guilford; having been convicted by two *Surrey*-justices, as a rogue and vagabond, upon 17 G. 2. c. 5. § 7. (to amend and make more effectual the laws relating to rogues, vagabonds, &c.) for running away from his parish, and leaving his wife and children to be maintained by the parish.

Mr. Hall, on behalf of the defendant, objected to the commitment.

1st. That he was *not convicted*: which he ought to have been.

2d. It is not alledged, “that his wife and children were chargeable to the parish.”

3d. He is not committed for any *limited time*; but—“till he shall be discharged according to the laws and customs of this realm.”

Mr. Mansfield, *contra*, endeavoured to support the commitment; by 1st. denying that a conviction was necessary; 2dly. by arguing, that the words used were

(g) It appears from the printed case in *Dom. Proc.* that there was a recital in the act, that *Thomas* who was afterwards vouchee in the recovery, was only tenant for life, and the act was obtained upon his petition; and yet it was determined that he was tenant in tail, because the object of the act was only to remove doubts; for doubts would have been sufficient to prevent any person from contracting for building leases, which by the act he was enabled to make.

tantamount to an allegation "that they were chargeable to the parish;" 3dly. by attempting to shew that these words of the commitment are equivalent to the direction of the statute, which is, "there to remain until the next general or quarter-sessions, or for any less time as such justice or justices shall think proper."

1765.

REX
V.
HALL.

Lord MANSFIELD observed, that the 2d and 3d objections were sufficient to invalidate the commitment: and it was better not to give any hasty opinion about the necessity of a formal conviction. [A conviction is necessary. 4 Durn. 221.]

The man was DISCHARGED.

SHUBRICK *versus* SALMOND.

[1637]

THIS was an action of covenant upon a charter-party of affreightment, by the merchant who hired the ship, against the master of the ship, for a breach of contract in not going to the port of *Winyaw* in *South Carolina*, as he had covenanted to do. Tuesday. 5th Feb. 1765.

The declaration set forth, that the defendant, being shortly after bound on a voyage to the island of *Madeira*, by charter-party under hand and seal dated 22d October 1762, covenanted that he would, directly as wind and weather would permit, after the discharge of that outward bound cargo at the island of *Madeira*, sail and proceed to *Winyaw* in *South Carolina*, or as near thereto as he could safely get; and there stay forty running days from the time of such arrival, if not sooner dispatched; and load his ship with such rice and other goods as the plaintiff's agents, &c. should tender to be laden: in consideration whereof, the plaintiff agreed to pay him freight at the rate of 4l. 10s. per ton for every ton delivered at the port of *London*, and also two third parts of port charges and pilogate, &c.

An express covenant shall bind to performance. (Mr. Justice Denison and Mr. Justice Yates, were absent.)

In this charter-party is the following proviso—"That if the said ship should not be arrived at *Winyaw* aforesaid by the first day of *March* next ensuing the date of the said charter-party, that then and in such case it should be in the option of the said *Richard Shubrick* his factors or assigns on the said ship's arrival at *Winyaw*, either to load the said ship on the terms aforesaid, or not; or at the then current freight given to ships loading at *Winyaw* for the voyage aforesaid; or to refuse the said ship entirely: so always that such the intention of the said *Richard Shubrick* his factors or assigns was declared to the master of the said ship within forty-eight hours after his application to the factors or assigns of the said *Richard Shubrick* at *Winyaw*." And for the performance of the covenants, they bind themselves, each to the other, in the penalty of 1200l. [See 1 Durn. 312.]

1765.
SHUBRICK
V.
SALMOND.

The declaration assigned two breaches—1st. that the said ship *did not sail* and proceed to *Winyaw* or as near thereto as she could safely get, in order to load, &c. ; but on the contrary, the defendant did *wilfully* absent himself therefrom. 2d. That the defendant did not, on the said 1st of *March* or at any time since, arrive at *Winyaw* ; but *wilfully* absented himself therefrom.

[1638] Plea (in bar of the action)—That he *did* proceed with all convenient speed, and sail to the island of *Madeira* ; but by reason of *contrary winds and bad weather* and from no other cause, was prevented arriving *there* till the 16th of *February* 1763 ; so that it was *impossible* for him to discharge his outward bound cargo to *Madeira*.

To the 2d breach he made the same plea ; and that it was *impossible*, after the discharge of his cargo ; to arrive at *Winyaw* by the 1st day of *March*.

To this, the plaintiff demurred generally : and the defendant joined in demurrer.

Mr. *Ashhurst*, for the plaintiff, objected, that these were *bad pleas* ; for the defendant was *not discharged* from his engagement ; but *bound to perform* it. It is a contract *by deed* : and there was a *sufficient consideration* at the time of the agreement ; though, upon a *deed*, it is *not* so necessary that there should be a sufficient consideration.

He compared it to the case of the *Earl of Chesterfield v. the Duke of Bolton*, in the *Exchequer*, reported in *Comyns*, 627 : where there was a *covenant to repair* : and though the house was *burnt down*, the tenant was obliged to *rebuild* it. And whenever a man *covenants* to do a thing, he is bound to perform it. So is *Jeakill v. Linne, Heiley* 54. And *Parudine v. Jane, Aleyn*, 26, 27. And *Monk v. Cooper*, 2 *Str.* 763. which was upon a *covenant to pay rent* ; and there was also a *covenant to repair*, except in case of fire : the house was *burnt* ; and though the landlord did not *rebuild* it, nor did the tenant enjoy, during the time for which the rent was demanded ; yet the tenant was *obliged to pay* the rent, according to his *covenant*.

As the defendant did not arrive at *Winyaw* before the 1st of *March*, the plaintiff was to have his option, “ whether “ to load him or not.”

Mr. *Dunning, contra*, for the defendant. Here was a positive engagement to sail to *Winyaw* in *South Carolina*. On the other hand, there was a positive engagement to pay the freight ; with this proviso, that “ if the ship “ did not arrive before the first of *March*, the plaintiff “ was to have his election, whether to load the ship, “ or not.”

The ship did *not* arrive : and it is admitted, that it was *not the defendant's fault*. And therefore, as it did not

arrive, the plaintiff was *not obliged* either to load the ship or pay any freight. Therefore the *consideration fails*. The proviso is an express discharge from the reciprocal engagement: and the contract is void.

1765.

SIFUBRICK
V.

SALMOND.

The cases that have been cited were lately considered in Chancery, and determined not to be law; the case about Prince *Rupert*, particularly, *Pardine v. Jane*, in *Aleyn*.

The case between Mr. *Garrick* and Mr. *Barry* in *C. B.* was on articles for *Barry's* performance on the stage. *Garrick* and *Lacey* had covenanted to pay him 2l. 12s. 6d. each night that he should act, and to give him a benefit, &c. in case Mrs. *Cibber* should, &c. &c. The court held * the contract to be void; because there was no reciprocal obligation.

* I believe
this case was
never determined.

SOME consideration is necessary, to support the plaintiff's action. And here the consideration of paying the freight *fails*. Therefore there is a great inequality in this contract between the parties: it is a covenant on one side only. Therefore the plaintiff's action is *not* to be supported.

Mr. *Ashhurst*—in reply. The proviso was introduced in *favour* of the plaintiff; not to prejudice him, or to excuse the defendant.

The cases I cited do not turn upon the having a remedy over.

In *Garrick's* case against *Barry*, there was a want of mutuality from the *first entering* into the contract. Here, was a *good* consideration for the defendant's entering into a *positive* contract. He did do so: and he was obliged to perform it.

LORD MANSFIELD—Upon the true construction of this agreement, there is *no foundation of fact*, for arguing this *point of law*.

The distinction between *implied* covenants by operation of law, and *express* covenants, is, that *express* covenants are taken *more strictly*. A man may, without consideration, enter into an express covenant under hand and seal.

Here, each has bound himself by *express* covenant under hand and seal: and the defendant has *broken* the covenant on his part.

The plaintiff wanted a ship at *Winyaw* in *Carolina*, to load with rice: and therefore he covenanted with the defendant "to freight his ship there." And the defendant covenants *absolutely* "to go thither;" and in order to *quicken* the ship's arrival there, there is a proviso "that if he gets there by the first of *March*, he is to be *certain* of a freight: but if he does *not* arrive there before 1st of *March*, then the plaintiff was to declare

Plowd 308. 7.
446. 7. 2 B. 6.
note 347. 7. 2 B. 6.
1807 but a mere
written agreement
is void 7. 2 B. 6.
[1640] 128 in
post 1670

1765,
SHUBRICK
v.
SALMOND.

"in forty-eight hours, whether he would freight the ship or not." The defendant therefore thereby became the insurer of the *risque* of his getting there before the first of March: in which event, he was sure of a freight: but he still had a general chance of getting a freight even though he should not arrive there till after that time.

The words are *positive* and *express* "that he should go thither." The parties plainly meant that the ship was to go thither. And the consideration fails by his not going.

[Ante, 1593.] There was another case arising upon a fire, besides what has been mentioned: and all the opinions from the bar were "that though it was a hard case yet the tenant who had *covenanted* to pay the rent, was bound to pay it."

Mr. Justice WILMOT was of the same opinion.

If the defendant had not *expressly covenanted* to go to this port; and had been unavoidably prevented, without any default in himself; it might have been a different case.*

* See the distinction, in Aleyn, 37. [Also 1 H. Bl. 86.]

In the case of the exception of fire, the tenant undertook to pay the rent in all events: and was therefore *obliged* to pay it.

Here, the freighter had rice at *Winyaw*. He agrees with the defendant "to go thither." He *expressly covenants to go, at all events*. In order to *quicken* him, it is stipulated by a proviso "that if he do not arrive before the first of March, the freighter is to have his option, to load his ship, or not." The consideration to him is his being *sure of a freight, in case* he got there by the first of March. But this proviso can not excuse him for not going thither at all, because he could not get there so soon as that day: when he had *expressly covenanted to go* to that port.

Lord MANSFIELD—The demurrer must be overruled.

JUDGMENT for the PLAINTIFF.

[1641]

REX versus THE INHABITANTS OF SPOTLAND.

This case is already printed and published, in the quarto edition of my SETTLEMENT-CASES. No. 170. P. 527. See it abridged, in the Table.

REX versus HOLMES, MAYOR OF WIGAN.

Thursday, 7th Feb. 1766.

A return to a mandamus filed after the death of the officer, seems to be irregular. * He was now dead, since the filing of the return; but

ON Thursday, 22d November last, Mr. Serjeant *Aspinall* and Mr. *Dunning* moved to take off of the file the return to a mandamus directed to the defendant *Holmes*, commanding him to restore *Edward Leatherbarrow** to his office. * He was now dead, since the filing of the return; but was alive at the filing of it.

the office of an inn-burgess of *Wigan*; on affidavit "that *Holmes* was DEAD at the time of the return being "filed:" (which was upon the last day of last Trinity Term, on the motion of Mr. *Clayton*.) The import of it was, "that *Holmes* was dead before the motion was made "for filing the return."

1765

REX
V.HOLMES,
MAYOR OF
WIGAN.

Lord MANSFIELD and Mr. Justice WILMOT—
It turns upon this—"whether the court could have admitted the return to have been filed, if the fact had been "disclosed to them."

Note—The *mandamus* issued in 1759: and *Holmes* died about three years ago.

The difficulty was, *against whom* to grant the rule; both *Holmes* and *Leatherbarrow* being dead.

The motion ended in this—To stand over till the first day of the present term; Mr. *Clayton* undertaking to shew cause then, and file his affidavit in answer to the present affidavit, a week before the term.

Accordingly--

Mr. *Clayton*, Mr. *Morton*, and Mr. *Wallace*, on Thursday 24th January last, shewed this cause why the writ of *mandamus* and the return thereof should not be taken off the file; viz. that the return was duly MADE in 1759, and then actually signed by the mayor, at a common hall; and in July 1760, delivered over to Mr. *Holt Lee*, the agent for the prosecutors of the writ: and the persons commanded by the writ to be restored always afterwards acted as in-burgesses, in consequence of such restoration. *Holmes* died in 1762. And *Brownley*, the present agent for this motion, knew all this; but has suppressed it. We did not indeed then think it necessary to file it: but we had a right to file it, even after *Holmes's* death: and it was no irregularity to do so.

[1642]

Mr. Serjeant *Aspinall* and Mr. *Dunning*, contra, for the rule.

The return ought not to have been filed AFTER the mayor's death. It can not now be traversed. The mayor gave no authority to file it. And he signed it contrary to the opinion of the corporate assembly.

The only question is, "whether the court would have "ordered the return to be filed, if they had been apprized "of the real state of the facts." If they would not, in that case, have ordered it to be filed, they will now order it to be taken off the file.

A bishop's certificate of an excommunication is null and void and of no effect, if not received in the bishop's life time: and his successor must certify. 8 Co. 69. a. *Trollop's* case.

Lord MANSFIELD asking "whether there was "any limitation to the time of filing returns; and whether

1765.

REX

V.

HOLMES,
MAYOR OF
WIGAN.

" a return can be filed *after* the death of the party who made it."

Mr. Serjeant *Aspinall*, to prove, " that the return must come into court by the *hands* of the mayor," cited 12 *Mod.* 308. the *King v. Borough of Abingdon*. The words there used are—" And the return must come by mayor's hands into court."

Mr. Justice *WILMOT*—The return was signed in 1759, and kept in the mayor's custody : in *July* 1760, he delivered it to one *Holt Lee*, who kept it in his hands till *after the mayor's death*, without filing it. It was filed indeed *afterwards*, at a time when the mayor could neither civilly nor criminally be *answerable* : neither was it filed at the *application* of any of the persons restored ; nor even any claiming under them.

Therefore I have great doubt. I am afraid of the *precedent*.

[1643]

Lord MANSFIELD—It is a return of an act really done : and the persons commanded to be restored ought not to lose their right, merely because the mayor did not file the return. Therefore it would have been a mere matter of form, *if* the mayor had been *alive*. The question is, " whether his *death* makes any difference."

Convictions are never drawn up, till some occasion calls upon the prosecutor to draw them up. There were many at *St. Margaret's Hill*, which are not drawn up yet.

I suppose, the persons who have now filed this return have some *interest* in it.

Mr. *Athorpe* (secondary of the Crown-office) informed the court, that the prosecutor might, at any time, have called for the return. And

Mr. *Barlow* said there were two returns *drawn* at the time ; one, as the mayor's ; the other, as by the corporation : but neither was then *filed*.

Curia advisare vult.

The opinion of the court was now moved for.

Mr. Justice *WILMOT*—I think, this return ought not to stand upon the record.

The *mandamus* was moved for, as of course : and was directed " to the mayor" *alone*. I think it ought to have been directed to those who had power to return it. If so, the writ and return seem to be a nullity. But I do not go upon *that*.

The writs were delivered to the mayor in 1759 ; he called a common hall ; the common hall restored the persons named in the writs ; the mayor then signed a return, " that he had restored them ;" in *July* 1760, he delivered this return to *Holt Lee*, their agent ; the mayor

died in 1762: in *Trinity Term* 1764, the writs were filed.

1765.

The question is, "whether they ought to have been filed *after the mayor's death*, under these particular circumstances."

REX
V.

HOLMES,
MAYOR OF
WIGAN.

If the return ought not to have been *received*, it ought to be *taken off* the file.

In general, every return is ambulatory, and in the breast of the person to whom the writ is directed, *till it is filed*. Signing is not necessary, nor material.

[1644]

The only way of getting off of a return, is by an action or an information against the person who returns it. There was a case in *M. 7 G. 2. Rex v. Wilkes*, in *Calne*; which went upon this principle, "that it can only be controverted by action or information, *if* it be once received." But this man was *dead* before it was received.

Though this *wandamus* is directed to the mayor *only*; yet he himself understood the return to be made with the consent of the corporation or common hall.*

* V. able,
p. 1486.

This return, if it should stand, may be urged as a *conclusive evidence*, not only "that it was made by him:" but also "that it was made *with the consent* of the corporation." So that, if it is permitted to stand, it will preclude the entering into the question "whether it was *with or without* the consent of the corporation:" for, this can never be disproved by any evidence: the question cannot be inquired into, either directly or collaterally. It can not be examined in any action or information against him, being *dead* before it was received.

As long therefore, as this return stands, the question, "whether the restoration was or was not *with the consent* of the corporation," is bound down, and can never be entered into; for no evidence can now be received to controvert this fact of the corporation's consent.

And as it *may* be applied to this purpose, I therefore think the return ought to be taken off the file.

If such intention be *wared*, and that question lies open, it may answer my difficulty.

If that question is left open, I am entirely satisfied.

Mr. Attorney General offered to come into any rule for leaving that question open.

Mr. Serjeant *Aspinall*—But nevertheless, *other people hereafter* may make that use of it.

Lord MANSFIELD—Undoubtedly, that question [1645] ought to be *left open*.

Mr. *Dunning* continued to insist on the return being *taken off the file*; and offered to admit the fact "that the mayor *himself* did make such a return."

Lord MANSFIELD and Mr. Justice WILMOT—

1765.

REX
v.BOLMER,
MAYOR OF
WIGAN.
* Trollop's
Case, 8 Co.
69. a.

If a returning officer was to die immediately after signing a return and before the filing it, the court might direct an issue to try the validity of it.

Mr. Justice WILMOT. The reason of the * case which has been cited about the bishop's certificate, is, "that the succeeding bishop may have *absolved* the man: "and *therefore* the certificate must be signed by the successor."

I consider this return, *now*, as standing upon the admission of the prosecutors of the writ, "that no other use shall be made of it than barely that the mayor *did* restore him *in fact*;" without prejudice to the question concerning the *legality* of this restoration; or entering into the question about the corporation's concurring with him, or not.

Lord MANSFIELD.—Let this be taken down, as by the consent of counsel on both sides, in all the causes.

REX *versus* FELIX MAC DONALD.

Friday, 8th
Feb. 1765.

Indictment
does not lie
for receiving
unmarried
women into
a house to be
delivered of
children.

ON Monday last (the 4th of February) Mr. Morton moved to quash an indictment against the defendant for converting his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women; who after their delivery went away, and deserted their children, whereby the children became chargeable to the parish.

Lord MANSFIELD took notice, when it was first moved, of the narrow impolitic principles upon which the prosecutors had proceeded; and expressed his surprise, how such a bill could ever be *found*.

Mr. Attorney General now shewed cause. He said, all that the prosecutors desire, is "that the *parish may be indemnified*;" for, at present, the parish are burthened with all these bastard-children.

[1646]

Lord MANSFIELD.—But by what law is it criminal to deliver a woman when she is with child?

Cur. To be sure, this is *not* indictable.

RULE made ABSOLUTE, to QUASH
the indictment.

EASTER TERM,

1647-1648

5 GEO. III. B. R. 1765.

THE COURT WAS NOW *full*; SIR RICHARD ASTON, late [Black. Rep. Lord Chief Justice of the court of Common Pleas in 549.] *Ireland*, was called a Serjeant on the first day of this term; and took his place on the bench in this court, the next day; SIR THOMAS DENISON having resigned, on the 14th of February last.

REX *versus* VICE-CHANCELLOR, &c. of Cambridge. Thurs. 25th April 1765.

UPON the death of the late Earl of HARDWICKE, [S. C. 1 BL. 547.] a warm contest arose in the University of Cambridge, between the Earls of Sandwich and Hardwicke, for the office of HIGH STEWARD. Mandamus lies to compel the University to put their seal to their appointment of their high steward.

That officer is elected by a *grace*: which must pass the *caput* unanimously, and be assented to by the houses of *non-regents* and *regents*. [vide Vin. Abr. Tit. Officer (O).]

A GRACE passed the *caput*, for the Earl of Hardwicke, and was assented to in the house of *non-regents*, by a majority of *two*: on the 30th of March 1764, it came on in the house of *regents*. The two proctors mark the votes, in two lines; under "*placet*" and "*non placet*" when cast up they were *equal*.

The case was *new*: and they were at a loss, what to do.

The senior proctor (in the interest of Lord Hardwicke) [1648] insisted on a second scrutiny; supported by the order of the Vice-Chancellor. The junior proctor (in the opposite interest) refused going to a second scrutiny; because they *both agreed*, "that the votes were *equal*." He insisted on reporting, in form, "that the votes were *equal*;" which the other refused: and the report must be made by *both concurring*.

Upon this, the Vice-Chancellor *dissolved* the congregation, *without any report* having been made.

Afterwards, it was discovered, that Mr. Thomas Pitt, who voted in the *regents* house against the *grace*, was a master of above five years standing, and therefore ought to have voted amongst the *non-regents*.

1765. *If this vote was bad, the placets had a majority of one.*
 REX
 V.
 Vice-chancellor, &c. of the king. On the 18th of July 1758 (the next day) leave of absence was granted to him, as to a person actually created master of arts.
 CAM-
 BRIDGE.

The proctors had, (at first) made a *mistake*; each having omitted to mark the vote of the other; so that, in the paper of the senior proctor, the *placets* had a majority of one; and in the junior proctor's paper, the *non placets* had a majority of one. But they soon discovered the cause of the difference; and concurred in setting it right; which made the votes agree, in each paper.

A MANDAMUS was applied for, on Lord *Hardwicke's* behalf: and a rule to shew cause was granted: which rule was drawn up in the manner which will immediately appear; viz.

CAUSE was now shewn, why a *mandamus* should not issue to the Vice-Chancellor and others, of the university of *Cambridge*, to complete the election of the Earl of *Hardwicke*, into the office of high steward of that university.

The rule was made, first, upon the VICE-CHANCELLOR, to shew cause why a writ of *mandamus* should not issue, directed to him, requiring him to CONVENE and hold a congregation or convention of the university; to the end and for the purpose, that the proctors of the said university may declare whether the majority of the votes in the regent-house of the said university upon a grace proposed to the said house on the 30th day of *March* last past, for the election or appointment of *Philip* Earl of *Hardwicke* to be high steward of the said university, was against or in favour of the passing of the said grace.

The second part of the rule was upon *Daniel Longmire*, clerk, and *Ralph Forster*, clerk, PROCTORS of the said university. To shew cause why the like writ should not issue, directed to them, requiring them to declare whether the majority of the votes in the regent-house of the said university, upon a grace proposed in the said house on the said 30th day of *March* last, for the election or appointment of *Philip* Earl of *Hardwicke* to be high steward of the said university, was against or in favour of the passing of the said grace.

The third part of the rule was upon the said Vice-Chancellor, *Daniel Longmire*, *Ralph Forster*, *William Roberts*, and *Henry Talbot*, KEEPERS OF THE COMMON SEAL of the said university, to shew cause why the like writ should not issue, directed to them, commanding

and requiring them to PUT AND AFFIX the common seal of the said university to an instrument or letters patent appointing the said Philip Earl of Hurdwicke high steward of the said university, pursuant to the tenor of a grace passed in senate on the said 30th day of March last.

1766.

REX

V.

Vice-chancellor, &c. of

CAM-

BRIDGE.

THE COUNSEL who now shewed cause on the part of the *non placets*, were Mr. Attorney General (Sir Fletcher Norton,) Mr. Morton, and Mr. Blackstone.

In the first place, they argued that this *mandamus* would not issue, upon the foot of a *mandamus* "to hold a court-leet;" for, *this was not the university's case.*

By a charter of Hen. 1. The town had the court-leet.

By another of Hen. 3. the town had it: not the university.

In 4 Ric. 2. the town's people committed outrages against the university: and, the year after, viz.

In 5 Ric. 2. (17 Feb.) the university had their first grant.

In 8 Ric. 2. The university had another grant: which gives them their first power "to summon a jury to make presentments."

In H. 6. they had another grant: (giving them power to remove lewd women, &c.)

In 17 H. 8. An award was made by a judge of the King's Bench and two sergeants at law—"that nuisances should be corrected in the town-leets."

[1650]

In 3 Eliz. a charter (like that of H. 6.) makes the first mention of the office of STEWARD.

Therefore they have no PRESCRIPTIVE court-leet; nor have they a GRANT of any. Therefore the high steward is not steward of a court-leet; but only an officer AT WILL of the chancellor.

To prove, "that the court will not issue a *mandamus* "nugatorily"—they cited *Style*, 457. the *Protector* and *Craford*; and 1 *Shower*, 217, 251.

Secondly—There is no reason, they said, in the present case, to grant a MANDAMUS; because the university of Cambridge is not like an ordinary corporation; but is visitable by the crown, and subject to statutes to be given by the crown, being of royal foundation.

In 3 Ed. 6., the Bishop of Ely and others were appointed visitors; and King Edward the sixth gave statutes, which the university accepted. So did Queen Elizabeth. In the 12th year of her reign, she gave them a new body of statutes under which they are now governed; and in which, there is no provision for the office of steward: but they direct "that all officers not particularly shall be chosen as the vice-chancellor is to be chosen."

1765.
 REX
 V.
 Vice-chancellor, &c. of
 CAM-
 BRIDGE.

The university, having accepted these statutes, are therefore *bound by them*. And yet the election now in question was *not* as the election of a vice-chancellor. Therefore it is null and void.

Thirdly—On another ground, this *mandamus* should be refused. Lord *Hardwicke's* grace did *not* pass. Therefore this *mandamus* for enforcing it ought not to go: Mr. *Pitt* voted in the house where he *ought* to vote. He could not vote in any other place; his *quinquennium* was not expired.

Regents were, in their origin, *preceptors*.

[1631]

Regency was originally for *one* year: it was then enlarged to two, three, four, five years. Now from the nature of regency and the onus annexed to it, Mr. *Pitt* continued a regent. A royal *mandamus* can only confer a privilege; it cannot *exempt* the onus of disputations; and throw it upon others.

The *ordo senioritatis* is now, as it always was. And from the *ordo senioritatis* and the combination-paper, Mr. *Pitt's* *quinquennium* could not be expired, nor the onus of the *cursus disputationum* taken off from him. He could not be in the combination-paper of his college till 2d July 1759. If so, he voted in his right house.

* Dr. Roger
 Long, Henry
 Hubbard,
 B. D. Ralph
 Forster,
 M. A. Zacha-
 riah Brook,
 D. D. and
 Samuel Carr,
 M. A.

Fourthly—Lord *Hardwicke* was *not* elected: because five others* voted for him in the regent-house, who had no right to vote there; namely, three persons upon *resumed* graces, (which are seldom used but for the sake of a job,) *dispensing* with their standing, and *continuing* their regency; which *dispensing power* is contrary to the statutes. The two 'squire beadies also voted, *as* being in that office: now they were past the time of voting in the regent house, *as* masters of arts: for their *quinquennium* was expired. Therefore they ought to have voted in the non-regent house. These facts will be proved.

Lastly, from the *nature* of the present rule, there can be *no effect* of it. For *no other congregation* can do the act. The *then* *proctors* are *now* out of office, and cannot tell (by looking at scratches without names) how Mr. *Pitt* voted; nor have they any thing whereby to refresh their memories.

Either the former proceedings were a *nullity* by the sudden *dissolution* of the congregation by the vice-chancellor, without proroguing or adjourning it: or else, the Earl of *Hardwicke* was *rejected*. If either be true, no *mandamus* ought to issue; nor even if the votes were *equal*.

The only return that can be made must be "that the votes were *equal*:" and in *that* case, the election was *null and void*.

THE COUNSEL on the other side, for the *mandamus*, were Mr. *Yorke*, Mr. Solicitor General (*De Grey*) and

Mr. *Ashhurst*: but the two last declined adding any thing to what Mr. *Yorke* had said; as he had been so copious in his argument: which, indeed, was very full and elaborate, and too long to be minutely here particularized. What follows may perhaps convey a general view of it.

Mr. *Yorke* first discussed these two previous points: 1st. Whether the *university* have a COURT-LEET, whereof the *high steward* is a necessary officer; 2dly. What was the nature of his office as *steward of the leet*.

1st. He argued, that they have such a franchise. They may have it by *prescription*; and yet may also have a *charter confirming it*. The 13 *Eliz. c. 29. confirms* courts-leet and view of frank-pledge to them.

Upon the 2d previous point, he argued that the office was *incident* to the court. Consequently, a *mandamus* to admit him to it, is a *proper* method.

THE GENERAL QUESTION he said, is, "whether the person elected has a *corporate* right.

The present question is not upon the right of the *electors*, but of the *elected*. The court will support such right by a *mandamus*, if it appears.

As to the MERITS—The question will turn upon the *right*, and upon the *remedy*.

FIRST—As to the *right*—he proposed to consider,

1st. The *mode of election*.

2dly. Mr. *Pitt's* vote.

3dly. The *other five* votes (objected to by the other side.)

1st. As to the *mode of election*—He entered into it at large. First, as to the construction of the statute of 40 *Eliz.* "De nominatione, &c." It does not take in *superior* officers to those enumerated. And the *usage* is of above 240 years.

Besides, this new charter does not affect the old *prescriptive* rights.

The two universities are now considered as *lay-corporations* with temporal rights; not as eleemosynary foundations, as particular colleges are.* This puts an end to the right of the crown "to visit them." [*1 *Lev. 284.*]

The *usage* shews only a *partial acceptance* of the statutes of Queen *Elizabeth*.

2dly. As to the unqualified votes—He agreed that the regents were originally *teachers* of the younger part of the university; and that they were discharged of this onus, after they had performed it a sufficient time.

Masters of arts became so by three different methods. (And he went through the three sorts.) In ordinary cases, the admission is at various times. Mr. *Pitt* was created on the 17th of *July* 1758, and on the 18th had leave of absence. He was bound to perform exercises; and in

1765.

REX

V.

Vice-chancellor, &c. of

CAM-
BRIDGE.

[1652]

[1653]

1765.

REX
v.Vice-chan-
cellor, &c. of
CAM-
BRIDGE.

October following, did so. And he was capable of bearing offices, and even of being proctor: for he was created, as well as admitt'd. And the *ordo senioritatis* is no authority against Mr. Pitt's special admittance by royal mandate on 17th of July; nor the combination-paper: for, Mr. Pitt was created upon his admission, by the words "*Magister incipe*"; and was a graduate on 18th of July 1766. He therefore was disqualified to vote in the regent-house, after his five years were expired.

Then he answered the objections to the proctor's oath of secrecy upon collecting the votes in the separate houses.

As to the two beadles and the three resumed graces—The beadles vote in the regent-house, as being attendant upon the vice-chancellor in that house. And the resumed regencies are common for various reasons: and the usage of doing it is established; and is consistent with the 42d statute of Queen Elizabeth.

Second Point—The remedy—

The question is "whether the officer has been elected "by a majority of lawful votes."—

Here, a stranger interfered and voted, so as to prevent a declaration by the presiding officer.

If *paria sint suffragia*, there is evidence "that a second scrutiny, that is, a second collection (not a counting only) "of votes ought to be entered upon." There has been no fault either in the electors, or in the presiding officer.

Even if a *negative* had been declared, the court would have granted a *mandamus*, if the rightful title had appeared to be in the person negatived. Much more, if nothing is wanting but a formal positive declaration.

[1654]

Upon informations in nature of *quo warranto*, the defendant must either make a title or disclaim. But there is no need of a corporate declaration of his election. He then cited several cases from the MSS. of the late Lord Hardwicke; one of them was in † *Honiton*; another in the ‡ *Devizes*, and a third in § *Penryn*. From which cases, he inferred, that if the party elected has a *substantial right*, the court will grant a *mandamus*, though there was no formal *declaration* of his election.

A *mandamus* to admit may go to the officer, or to the corporation. The return must be the same; it must be either "*electus*;" or "*non electus*;" that is, it must answer to the suggestion of the writ. 1 *Siderf.* 209, 210. *Hereford's* case.

The return could not be "that the election was not "*declared*." The case of *Stoughton v. Reynolds*, 2 *Strange* 1045, shews that there was no need of a *declaration*.

Lastly, he argued *ab inconvenienti*.

As to the accidental change of the proctors—The declaration, he said, would be *only ministerial*.

Adjourned till to-morrow.

† P. and Tr.
13 G. 1.‡ Tr. and M.
4 & 5 G. 1.§ V. 1 *Strange*
682.

Sir *Fletcher Norton* (Attorney General) replied, on the part of the *non placets*. 1765.

I could not be present till he was far advanced in his reply. What I heard, was to the following effect.

He denied that there could be a *partial* acceptance of a charter. It must either be accepted *in toto*, or *not at all*: the corporation to which it is given can not garble it as they please, *taking part*, and *leaving part*. Vice-chancellor, &c. of CAMBRIDGE.

As to Mr. *Pitt's* vote—he insisted that he could not commence regent till 1759; and could not be a non-regent till five years after. Friday, 26th April, 1765.

As to the three *resumed* graces—they are intitled to no favour, and are *contrary* to the statutes of Queen *Elizabeth*. And there can be no bye-law or provisions *contrary* to an accepted charter. [Cont. post. 1657, 1658.]

As to the two 'squire-beadles—They have no right to vote in *either* house, *virtute officij*: they must vote according to their *degrees*. And by their *degrees*, they were undoubtedly *non-regents*. [1655]

The register (a superior office to the 'squire-beadles) has a chair in the regent-house; and yet goes to the non-regent house, to vote. And the *usage* pretended is of no more than twenty years.

If any one of these five voted in an improper house, it makes an end of the question.

As to Mr. *Yorke's* cases about informations in the nature of *quo warranto*, and the manner of pleading in them, and about the returns of writs of *mandamus*—I see no need to answer them; because they do not apply to the present case.

As to the necessity of a *declaration* of the election—It depends upon circumstances: in *some* cases, a declaration is necessary, by the constitution; in *others*, not. Here, a declaration *was* necessary, in order to give a complete right.

I rely on the *MERITS only*: and I say, that on the *merits* of this case, *no mandamus* can go.

Here is no evidence of a *let*, nor of any *steward of a let*; the election was carried on rightly; Mr. *Pitt* voted in the right house; a second scrutiny would have been improper; the two proctors agreed in rectifying their mistake; many of the members were gone, when the second scrutiny was demanded; it was demanded on the sole foot of the proctor's mis-counting; (for Mr. *Pitt's* vote was not then thought of as an objection:) the five votes were in the wrong house: upon the whole, a *mandamus* ought not to go, upon the merits.

Lord MANSFIELD thought the matter lay in a narrow compass, and was not attended with any great difficulty.

1765.
 REX
 v.
 Vice-chan-
 cellor, &c. of
 CAM-
 BRIDGE.

[1656]

He then stated the case, from the affidavits; and explained the reasons upon which the court granted the present rule "to shew cause," in the manner they had done, with particular directions for notice to be given to all parties who had any right or concern in the question.

The university, as a body, have not thought fit to oppose it.

But it is opposed by all the *non placets*, and by some of those persons who have the custody of the common seal of the university.

There are three questions that arise upon this case: 1st. On the *validity* of Lord *Hardwicke's* election; 2d. If his right be clear, then whether a *mandamus* is a proper remedy: 3d. If it is, then *how* it ought to be directed.

1st Question.

First—As to Lord *Hardwicke's* right.

There does not seem to be the least contradiction, as to matters of FACT, amongst the witnesses on the two different sides; though they differ in opinion as to the right *resulting* from them.

The *mode* of election is traced back to the year 1524, (240 years ago.) The affidavits expressly swear "that the *mode* of electing the *high steward* has been by a *grace*, &c. &c." And to this, there is no contradiction: no one doubted it on the 30th of *March*, the day of the election.

But it is now contended "that the election of high steward ought to have been in the same mode as the *election* of a *vice-chancellor*." And this is rested on the statutes of Queen *Elizabeth*.

But there is a vast deal of difference between a new charter (a) granted to a new corporation, (who must take it as it is given;) and a new charter given to a corporation *already in being*, and acting either under a former charter or under prescriptive usage. The latter, a corporation already existing, are *not* obliged to accept the new charter *in toto*, and to receive either all or none of it: they may act *partly* under it, and *partly* under their old charter or prescription (b)

Whatever might be the notion in former times, it is most certain now, "that the corporations of the *UNIVERSITIES* are *LAY-corporations*: and that the crown *cannot take away from them* any rights that have been

(a) 6 *Vin.* 286. and S. P. acc. per *Wilmot* J. post. 1661. and per *Yates* J. post. 1663. and *Qu. Salk.* 190. 12 *Mod.* 247. and see 2 *Durn.* 532.

(b) *Buller* J. was inclined to think that a charter must be accepted *in toto*, if at all in a subsequent case—See *Doug.* 517. 535.

"formerly subsisting in them under old charters or prescriptive usage."

1765.

REX
V.

The validity of these *new* charters must turn upon the acceptance of the university.

Vice-chancellor, &c. of
CAM-
BRIDGE.

*When Queen Elizabeth gave these statutes, the university of Cambridge was of *ancient establishment*, and had many *prescriptive rights*, as well as *former charters* of very old date. And there was no intention to alter and overturn their ancient constitution. These statutes undoubtedly meant to leave a vast deal upon the *ancient* constitution of the university; *without* repealing or abrogating their old established customs, rights, and privileges: nor could the university mean to accept them upon any *such* terms.

Therefore I am clear, that the statutes of Queen Elizabeth can not be set up, to *invalidate* establishments subsisting long before she was born.

The office of HIGH STEWARD was a very *high* office in the university, long before she was born; and was possessed by very great men; a much higher office than *stewards of courts leet*: she never intended to *alter the mode of election* to it: nor was the *mode of election* objected to by any body, at the *time* of this election.

Therefore I am clear that the *mode and manner* of this election was *right*.

Then as to the RIGHT of Lord Hardwicke, under it.

The election was quite fair. The little mistake in the marking was immediately set right. The proctors declared the votes to be equal. No one then thought of the objection to Mr. Pitt's vote. But disputes arising upon *another* matter, the congregation was dissolved.

It is now objected, by Lord Hardwicke, "that Mr. Pitt, being a stranger in the regent-house, obtruded his *had* vote: which vote being disallowed will give Lord Hardwicke a majority of one."

This depends upon the validity of Mr. Pitt's vote: on which there is no contrariety of evidence, as to the *facts*. (He then stated the facts relating to it.)

The whole turns upon the commencement of his inauguration to the degree of master of arts. This depends upon the usage of the university. And it is sworn "that the degree begins from the *day of erection*, when it was conferred under a royal mandate:" and many circumstances of the present case confirm this. [1658]

1st. The *leave of absence* given the next day, infers that he was then a master complete.

2dly. He appears to be *obliged to dispute*, in October 1758: for he then pays for *disung* (a barbarous term for disputing;) the fees for it being accounted for between the benches, in October 1758; whereas the fees of those

1765.

REX

V.

Vice-chancellor, &c. of

CAM-
BRIDGE.

graduates whose right commenced at the *next general commencement* were not accounted for till 1759.

3dly. What shews "that the degrees of such as take " them by royal mandate must commence *from their inauguration*," is the *combination-paper*, and the *ordo senioritatis*. Mr. Pitt's name is *not* in the *former*; but it *is* in the *latter*, being made *after* the general commencement in 1758. And the names therein contained are either noblemen, or such as took their degrees by royal mandate. This suggests strongly "that the degrees of " those who take them by royal mandate commence from " *their creation*." And there is no evidence to the contrary. And the *expiration* of the *quinquennium* depends upon the *commencement* of it.

If so, there is a *majority of one* for Lord Hardwicke; unless the other side can disqualify some of those who voted for him.

Five of them are objected to.

But as to the three *resumed* graces—There is no pretence that that transaction was done with any improper view or design. And in respect of essential voting, it is quite indifferent: for it is not material, whether they give their vote in *one* house, or in the *other*. And it is agreeable to the *usage* of the university, "that they should vote " where they have voted." Therefore there is no objection to *them*.

As to the squire-beadles—The *usage* appears to be, "that they *do* vote in the regent-house." And it is quite indifferent in itself, *what* house they vote in: and as they are attendant upon the vice-chancellor who votes in the regent-house, it seems that there is some small reason for *their* doing so too.

However, the *constant usage* is *sufficient* to shew which house they ought to vote in; *without* assigning the particular reasons upon which such an usage has been founded.

[1659] Thus stands the RIGHT to the office.

The next question is as to the REMEDY.

There is *no other* than what is now applied for. And this is the very reason of the court's issuing the prerogative writ of a *mandamus*; because there is *no other specific* remedy.

It is admitted, that a *mandamus* would lie, if it can be considered as the case of a steward of a court-leet.

But it is said, "that the franchise of the court-leet " is in the *town of Cambridge*, and *not* in the *university*."

But the UNIVERSITY have *enjoyed* it long; and they are now in *possession* of it: and they have elected Lord Hardwicke *under* this claim of many ages standing. And the *town* do not appear, to us, to *dispute* it.

But if it was *not* so, I should still think that, as here is

no other specific remedy the court ought to grant the writ. And so they will do in ecclesiastical cases, where it appears that there is no other specific remedy.

The last question is, how the *mandamus* ought to be
DIRECTED.
Mr. Yorke has gone fully into the argument "that the
"rule for a *mandamus* ought to be founded upon the
"merits of the ELECTION, and not upon the declaration of
"the proctors."

The declaration of the proctors can not affect the substantial right. The right of election appears to be in LORD HARDWICKE. And I am very clear, that the foundation of the rule should be the election.

Even if the proctors had declared contrary to the truth of the election, yet the writ ought to have gone. But here was no declaration at all.

It now appears, that Lord Hardwicke was duly elected: and the last part of the rule will procure him the proper remedy, without meddling with the two former parts of it.

Therefore the *mandamus* ought to go to the keepers of the seal for the time being, requiring and commanding them to put the seal of the university to the instrument of his appointment: and the two former parts of the rule ought to be discharged. [1660]

Mr. Justice WILMOT, having first opened the case, entered into the reasons of wording the rule as it now stands: and he thought that it ought to go, as Lord Mansfield had proposed.

If there is a clear right in Lord Hardwicke, the court ought, he said, to find out a suitable and adequate REMEDY; and (in his opinion) even to have made a precedent, if they could not have found one: for where there is a right, law and justice require that there should be some remedy or other. And he declared that he never saw a clearer case both as to the right, and as to the remedy, than this appeared to him to be.

This remedy is undoubtedly proper for this right.

Here are vestiges, in the records laid before us, (c) shewing that there was a court-leet in the town of Cambridge "three or four centuries ago." But it does not appear that they have enjoyed or claimed any such franchise for a century or two last past: and they do not appear to be now in possession of any such franchise. [2 Wils. 2. 3.]

On the contrary, the UNIVERSITY are in possession of a court-leet ever since 1690, at least seventy-five years, ex-

(c) Note, That a court leet may be forfeited by non user. 2 Hawk. 73. Andr. 14, 15.

1765.

REX

V.

Vice-chancellor, &c. of

CAM-

BRIDGE.

[4 Burr. 1588.

S. P. Cowp.

378]

3d Question.

1765.
 REX
 v.
 Vice-chan-
 cellor, &c. of
 CAM-
 BRIDGE.

cised by their deputy-steward. Therefore it may be *presumed* that there has been some grant, surrender, forfeiture or assignment *from the town to them*: or something of the like kind: and we cannot therefore presume any to be at this time in the town.

But *if* the presumption was *not* so strong upon such a possession; yet *how* could we say, that the university have *usurped* a franchise which does not appear to be in any one else?

However, I do not think it material, "whether the university have a right to a *court-leet*, or not." For they have a right to such an OFFICER as a HIGH STEWARD, with a *stipendium*: and he has a right to come here for this writ, this great prerogative writ of *mandamus*, (a remedy which turns more, in my opinion, upon *principle* than upon a *precedent*;) and we *ought* to grant it, because there is no *other* adequate remedy.

[1661] The *office* of high steward appears to have been of two hundred and forty years standing: and the greatest men appear to have been chosen into it. If the Earl of *Hardwicke* has been now duly and regularly elected into it, he ought to have a *mandamus* to admit him to his right.

The next question then is, "whether Lord *Hardwicke* was *regularly elected*, and had a majority of voices in the *regent-house*."

As to the *mode* of election—It is objected "that he ought, by the statutes of Queen *Elizabeth*, to have been chosen as the vice-chancellor is chosen."

But this seems to be an *after-thought*. The *non placets* all voted in a different manner from that in which a vice-chancellor is elected; namely, by a *grace*: and they made no objection to the mode of election, at the time when they gave their votes, though they do object to it *now*.

[Ante, 1656.] It is the *concurrence* and *acceptance* of the university that give the *force* to the charter of the crown. And they may take and accept the body of statutes or code of laws, *separately and distinctly*: they are *not* bound to take *all*, or leave *all*. And it appears that they here have *in fact* done so: for they have always chosen this office (their high steward) by way of *grace*. I do not think that this *superior* office of *high stewardship* is included in this statute, which begins with specifying persons of much inferior rank: but if it had been so, we could not have overturned an *usage* of two hundred and forty years standing, upon words of this statute which might seem contrary to such settled usage. It certainly did not intend to *repeal* the *old* customs and usages of the university, *except* in those cases where the university chose it. And, from filial piety to my alma mater, (the place where I had

the honour to be a member and receive my education,) I can not help rejecting the attempt to overturn such an ancient usage, with the utmost indignation.

As to the declaration of the proctors—I think it *immaterial*: for the question depends not upon *that*, but upon the real majority of legal votes. **Their declaration* cannot alter or affect that. *If they had made a declaration; and even if such their declaration had been contrary to the truth of the fair and real right, the court must have taken up the matter upon the true and real merits: for the right to the office attached in Lord Hardwicke, upon his having a majority of legal votes. The circumstance of there being “no declaration at all,” can not put him in a worse case than if there had been a declaration against him, a non placet declaration. If he had a real right, this court ought to give activity to it: and the omission of a declaration by the proctors, or the falsity of it, can not affect their judgment concerning the legality of the right.*

He then expressed his sentiments about the *oath of secrecy*, which though it had been much discussed, did not perhaps materially concern the *present point*, so much as it did the *private conscience* of the proctor: and he (as Lord Mansfield had before done) declared “that such an oath could not defend the taker of it from giving evidence *before a court of justice*,” even if it were necessary to understand it in a *stricter* sense than it seemed to them to import.

As to Mr. PITT’s vote—There is a *general* commencement, and a *special* one. “*Incipe magister*,” is what makes the commencement of the *right* to the degree, in *both* cases: he thereby commences master of arts. The difference between the degrees by *royal mandate*, and the *ordinary* degree is, that an *ordinary* graduate commences at the *general* commencement; one under royal mandate commences upon the words “*incipe magister*” pronounced at the *time*.

The *combination-paper* and the *ordo senioritatis* evince this: and the *leave of absence* consists with it, and confirms it; as it shews that he was then considered as a *complete* master of arts, and subject to the *onus* of that degree.

He therefore commenced *complete* master of arts by the word “*incipe*.” Consequently, he was a *non-regent* when he voted; and therefore his vote was thrown away, and of no validity.

As to the *resumed* graces and the *’squire beadles*—The *usage* is sufficiently proved; and it is consistent with the statutes, in such cases as are not particularly provided for by them. And these resumed graces do not at all

1765.

REX
V.Vice-chancellor, &c. of
CAM-
BRIDGE.

1662]

1765.

REX.

Y.

Vice-chancellor, &c. of

CAM-

BRIDGE.

appear to have been made with any *improper view or design*, or with any relation to the *occasion of this election*.

Therefore Lord *Hardwicke* had a majority of legal votes.

It follows that we ought to grant the *mandamus* in the manner it was *originally prayed*; viz. a *mandamus* to be directed to the keepers of the common seal of the university, commanding and requiring them to *put and affix the common seal* of the said university to the diploma or instrument appointing the Earl of *Hardwicke* high steward of the university, pursuant to the tenor of the grace passed in senate on the 30th of *March* last.

[1663]

Mr. Justice *Yates* and Mr. Justice *Aston* were unanimously of opinion with Lord *Mansfield* and Mr. Justice *Wilmot*, " that a *mandamus* ought to go; and " that it ought to be directed to the keepers of the university-seal, commanding them to affix it to the diploma of " Lord *Hardwicke's* appointment to the office of high-steward."

[Ante 1662.]

They delivered their opinions at large; and founded them upon the like reasoning as has been already expressed. They agreed, that the question turned upon the *real merits of the election*: not upon the *declaration* of the proctors. They agreed also, that Mr. *Pitt* voted in the wrong house; his five years being expired: for that, being an honorary graduate, by *royal mandate*, he commenced master of arts upon the vice-chancellor's saying "*incipe magister*," i. e. from the time of inauguration, and *before* the general commencement; whereas ordinary, regular graduates do not commence so, *till* the general commencement. And his duty commenced with his degree. They also agreed, that Lord *Hardwicke* appeared to have a clear right; and that all the objections to it were sufficiently answered: and if he had a *right*, he certainly ought to have a *remedy*. And Mr. Justice *Aston* mentioned the case of *the King* against *Dr. Bland*, provost of *Eton*, *Mich.* 1740. 14 G. 2. B. R. who was commanded by a *mandamus* to affix the college-seal to a presentation by the fellows to a vicarage. Mr. Justice *Yates* inclined to think that the *university* appeared to have the court-leet. And he held, that an *old* corporation, who accept a *new* charter, may still act under their former charter, or under prescriptive usage.

[Ante, 1656.]

Lord *Mansfield*—Let the rule be taken in the manner we have directed.

1765.

PILLANS and ROSE *versus* VAN MIEROP and HOPKINS. Tuesday, 30th April 1765.

ON Friday 25th of January last, Mr. Attorney General Norton, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict against evidence: the substance of which evidence was as follows.

One White, a merchant in Ireland, desired to draw upon the plaintiffs, who were merchants at Rotterdam in Holland, for 800l. payable to one Clifford; and proposed to give them credit upon a good house in London, for their reimbursement; or any other method of reimbursement.

The plaintiffs, in answer, desired a confirmed credit upon a house of rank in London; as the condition of their accepting the bill. White names the house of the defendants, as this house of rank; and offers credit upon them. Whereupon the plaintiffs honoured the draught, and paid the money; and then wrote to the defendants Van Mierop and Hopkins, merchants in London, (to whom White also wrote, about the same time,) desiring to know "whether they would accept such bills as they, the plaintiffs, should in about a month's time draw upon the said Van Mierop's and Hopkins's house here in London, for 800l. upon the credit of WHITE:" and they, having received their assent, accordingly drew upon the defendants. In the interim White failed before their draught came to hand, or was even drawn: and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them. Which they, nevertheless, did: and therefore the defendants refused to pay their bills.

On the trial, a verdict was found for the defendants.

Upon shewing cause, on Monday 11th February last, it turned upon the several letters that had respectively passed between the plaintiffs, and defendants, and White. The letters were read: 1st. Those * from White and Co. in Ireland, to the plaintiffs in Holland; (by which it appeared that Pillans and Rose had then accepted the bills drawn upon them by White, payable to Clifford;) then those of the plaintiffs to the defendants; and also White's to the defendants; then those of the defendants to the plaintiffs, † agreeing to honour their bill drawn on account of White; the letter from the defendants to the plaintiffs, informing them "that White had stopt payment," desiring them not to draw, as they could not accept their draught; and lastly, that which the plaintiffs wrote to the defendants, "that they should draw on them, holding them not to be at liberty to withdraw from their engagement."

THE COUNSEL for the defendants were Mr. Ser-

An undertaking to honour a bill of exchange, is binding upon the party so undertaking. [See 6 Ves. 9. 2 Ves. jun. 117. 5 Ves. 148. 868. 7 Durn. 351. 1664.] 1 East. 101. 4 East. 68. 2 East. 327. And note, that the ground of decision in this case was the consent which the court very properly decided to be sufficient.]

* Dated 16th Feb. 1762.

† Dated 19th March, 1762.

1765.
PILLANS
and ROSE
v.
VAN
MIEROP &
HOPKINS.

[1665]

* See like-
wise, *Hardres*,
72, 73, 74.

jeant *Dacy* and Mr. *Wallace*. They observed that the plaintiffs had given credit to *White*, above a month before the defendants had agreed to accept their draught. For it appears by *White's* letter of 16th February 1762, that *Pillans* and *Rose* had then actually accepted *Clifford's* bills: but *Van Mierop* and *Hopkins* did not agree to honour their draughts till 19th of March 1762. Therefore the consideration was past and done, before their promise was made. And they argued, and principally insisted, that for one man to undertake "to pay another man's debt," was a void undertaking; unless there was some consideration for such undertaking: and that a mere general promise, without benefit to the promiser, or loss to the promisee, was a nudum pactum. And they cited 1 Bulstr. 120/*Thorner v. Field*. *Dyer* 272. pl. 31. *Hunt v. Bate*. 2 Vern. 224, 225. *Cecil et al' v. Earl of Salisbury*. 1 Ro. Abr. 11. pl. 1. letter Q. "Consideration executed." *Yelv.* 40, 41. and 2 *Strange*, 933. *Hayes v. Warren*; where a past consideration was holden insufficient to raise an *assumpsit*.*

THE COUNSEL for the plaintiffs were Mr. Attorney General, Mr. *Walker* and Mr. *Dunning*. They denied this to be a past consideration; and insisted, that the liberty given to the plaintiffs, "to draw upon a confirmed house in London," (which was prior to the undertaking by the defendants,) was the consideration of the credit given by the plaintiff to *White's* draughts; and that this was a good and sufficient consideration for the undertaking made by the defendants. It relates back to the original transaction.

If any one promises to pay for goods delivered to a third person; such promise, being in writing, is a good one. And here *White* had had 800*l.* from the plaintiffs, upon this assurance: and the defendants undertake in writing, in pursuance and completion of this original assurance, to be answerable for *White's* reimbursing the plaintiffs. And a promise in writing, is out of the statute.

This case does not fall within those that have been cited: for *Van Mierop* and *Hopkins* had made themselves originally liable. An *ex post facto* event cannot alter the nature of an original promise. Their original promise made them liable, and bound them. And they are obliged, both by law, and in honour and honesty, to perform it.

It is a mercantile transaction: and it must be considered, upon the whole of it, as an admittance "that the defendants either had or soon would have effects of *White's* in their hands."

LORD MANSFIELD—The objection is, "that the letter whereby *Van Mierop* and *Hopkins* undertake to

"honour the plaintiff's bills, is *nudum pactum*." The other side deny it.

This is the only question, *here*.

But this is quite different from what passed at the trial: the *nudum pactum* was not mentioned at *that* time. The grounds* it was argued upon *there*, were, 1st. That this imported to be a credit given to *Pillans* and *Rose*, in prospect of a *future* credit to be given by them to *White*; and that this credit might well be countermanded *before* the advancement of any money: and this is so. 2dly. That there was a *fraud*; for that *Van Mierop* and *Hopkins* had reason to think that *White* had sent goods to *Pillans* and *Rose*; whereas this was a mere *lending of credit*. 3dly. That if *Pillans* and *Rose* had received goods from *White*, and retained them, till he failed, the defendant's undertaking was revocable.

I was then of opinion, that *Van Mierop* and *Hopkins* [5 East 518.] were bound by their letter; *unless* there was some *fraud* upon them: for that they had engaged under their hands, in a *mercantile transaction*, "to give credit for *Pillans* and *Rose's* reimbursement." And I did not see it to be *future*, as had been objected: nor did I see any *fraud*. And nothing was then urged about its being *nudum pactum*.

I have no idea, that promises "for the debt of another," are applicable to the present case.

This is (as *Mr. Walker* said) a *mercantile transaction*; and it depends upon these letters from merchant to merchant about *honouring bills*, to such an amount: and this credit is given upon a supposition "that the person who is to draw upon the undertakers within a certain time, *has goods in his hands, or will have them*." Here, *Pillans* and *Rose* trusted to this undertaking: and there is *no fraud*. Therefore it is quite upon *another foundation* than that of a *naked* promise from one, "to pay the debt of another."

Mr. Justice WILMOT--I own, the want of consideration, *at first*, occurred to me. But I *now* am satisfied, that this case has nothing to do with the cases of undertakings by one "to pay the debt of another." In *those* cases, it is settled, "that where the consideration is past, the action will *not* lie:" and yet this seems a *hard* case. The mere promise "to pay the debt of another," without *any* consideration at all, is *nudum pactum*: but the least spark of a consideration will be sufficient. It seems almost implied, that there must be some consideration: but if there be none at all, it is a *nudum pactum*. The statute must mean such a special promise as would have supported an action.

1765.

PILLANS
and ROSE
v.VAN
MIEROP &
HOPKINS.

1765. But all this is out of the *present* case. So also, I think, is all the *precedent* correspondence.
PILLANS and ROSE *It lies in a narrow compass.
v. *White, Pillans and Rose, and Van Mierop and Hopkins*
VAN had all a correspondence together: they have intercourse
MIEROP & together, mutually, in mercantile transactions. *Pillans*
HOPKINS. and *Rose* write to *Van Mierop* and *Hopkins*, to know
“ whether they will honour their draughts for 800l. in
“ about a month’s time.” They say, “ they *will*.” Now
it strikes me (as Mr. *Walker* said) that it admits “ that
“ they either have assets or effects of *White’s* in their
“ hands,” or “ that they have credit upon him.” Now
by this undertaking of a good house in London, and relying
upon it, they are deluded and diverted from using any
legal diligence to pursue *White*, or even not to part with
any effects of his which they might have in their hands
Therefore this seems to be an *irrevocable* undertaking by
Van Mierop and *Hopkins*: and they ought to be bound
by it. Consequently, there ought to be a new trial.

LORD MANSFIELD—A letter of credit may be given as well for money *already* advanced, as for money to be advanced *in future*.

Let it be argued again the next term: and you shall have the opinion of the *whole* court.

Ulterius Concilium.

Yesterday, this matter accordingly came on again; and was argued by Mr. *Wallace*, for the defendants; and by the same counsel as argued last term, for the plaintiffs.

The latter repeated and enforced their arguments. They said the consideration moved from *White* to the defendants; not from the plaintiffs *Pillans* and *Rose*, to the defendants: and as the defendants have undertaken for *White*, they can not revoke or retract their engagement.

This case is not like the cases cited: some of which are strange cases, and not founded on solid or sufficient reasons: and in others of them, there was *no* meritorious consideration at all. And Mr. *Walker* cited *Hardres* 71. *Reynolds* v. *Prosser*; where the consideration was adjudged sufficient, notwithstanding all the reasoning of Sir *Thomas Hardres*, and all the cases cited by him. That was an *assumpsit* by a stranger, in consideration that the plaintiff would forbear to prosecute Lord *Abergavenny* upon a judgment, in the name of the original plaintiff, by virtue of a letter of attorney “ to receive it to his own “ use.”

[1668] Serjeant *Davy* was heard, this morning, on behalf of the defendants; and urged, that the plaintiffs gave credit to *White*, upon his promising to reimburse them: and he said, there was a fraudulent concealment of facts.

WHITE's first letter could have no influence on the plaintiffs. For they afterwards desired a confirmed credit upon a house of rank in London: so that they did not rely on *White's* first letter which offered credit on the defendants, or any other method of reimbursement. And nothing had then passed between *White* and the defendants. For the first letter between them was on the 16th of *February* (a fortnight after:) and then the defendants were deceived into a false opinion "that it was for a future credit, and not to secure a past acceptance of *White's* bills by the plaintiffs." And this concealment of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of 800*l.* of *White's*, a fortnight before the defendant's letter of 16th *February*: which bill the plaintiffs had accepted upon assurance of credit on a house in London, to reimburse them. And this transaction was fraudulently concealed, both by *White* and the plaintiffs, from the defendants. If this had been disclosed, the defendants would have plainly seen "that the plaintiffs doubted of *White's* sufficiency;" by their requiring further security for his already contracted debt.

All letters of credit relate to future credit; not to debts before incurred; nor can the advancer of money thereupon, include an old debt before incurred.

A bill can not be accepted before it is drawn. This is only a promise to accept: for it is only a promise "to honour the bill; not a promise to pay it."

A promise "to pay a past debt of another person" is void at common law, for want of consideration: unless there be at least an implied promise from the debtor "to forbear suing the original debtor." But here was a debt clearly contracted by *White* with the plaintiffs on the credit of *White*: and there is no promise from the plaintiffs "to forbear suing *White*." A naked promise is a void promise: the consideration must be executory, not past or executed.

Lord MANSFIELD asked, if any case could be found, where the undertaking holden to be a *nudum pactum* was in writing.

Serjeant *Davy*—It was anciently doubted "whether a [1669]
"written acceptance of a bill of exchange was binding, "for want of consideration." It is so said, somewhere in *Lutwyche*.

Lord MANSFIELD—This is a matter of great consequence to trade and commerce, in every light.

If there was any kind of fraud in this transaction, the collusion and mala fides would have vacated the contract. But from these letters, it seems to me clear, that there was none. The first proposal from *White*, was "to reim-

1765.

PILLANS
and ROSE,

V.

VAN
MIEROP &
HOPKINS.

1765.

PILLANS
and ROSE

v.

VAN
MIEROP &
HOPKINS.
[1 Bosan. 565.]

"burse the plaintiffs by a remittance, or by credit on the "house of *Van Mierop*:" this was the *alternative* he proposed. The plaintiffs chose the *latter*. Both the plaintiffs and *White* wrote to *Van Mierop* and company. They answered "that they would honour the plaintiffs' draughts." So that the defendants assent to the proposal made by *White*, and ratify it. And it does not seem at all that the plaintiffs then doubted of *White's* sufficiency, or meant to conceal any thing from the defendants.

[15 Vin. 359.]

If there be no fraud, it is a mere question of *law*. The law of merchants, and the law of the land, is the same: a witness can not be admitted, to prove the *law* of merchants. We must consider it as a point of *law*. A *nudum pactum* does not exist, in the usage and law of merchants.

see *Case of Hopkins*
1773 35 Vin. 116,
p. 1639.

I take it, that the ancient notion about the want of consideration was for the sake of *evidence* only: for when it is reduced into *writing*, as in covenants, specialties, bonds, &c. * there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle.

In *commercial* cases amongst merchants, the want of consideration is *not* an objection.

[4 East. 66.]

1 East. 100.]

This is just the same thing as if *White* had drawn on *Van Mierop* and *Hopkins*, payable to the plaintiffs: it had been nothing to the plaintiffs, whether *Van Mierop* and Co. had effects of *White's* in their hands, or not: if they had accepted his bill. And this amounts to the same thing:—"I will give the bill due honour," is, in effect, *accepting* it. If a man agrees that he will do the formal part, the law looks upon it (in the case of an acceptance of a bill) as if *actually done*. This is an engagement "to accept the bill, if there was a necessity to accept it; and to pay it, when due:" and they *could not afterwards retract*. It would be very destructive to trade, and to trust in commercial dealing, if they could. There was nothing of *nudum pactum* mentioned to the *jury*; nor was it, I dare say, at all in *their* idea or contemplation.

[1 East. 104.
n.]

I think the point of *law* is with the plaintiffs.

Mr. Justice WILMOT—The question is, "whether this action can be supported, upon the breach of "this agreement."

I can find none of those cases that go upon its being *nudum pactum*, that are in *writing*; they are all, upon *parol*.

I have traced this matter of the *nudum pactum*; and it is very curious.

[5 Vin. 406.
16 Vin. 16.]

He then explained the principle of an agreement being looked upon as a *nudum pactum*: and how the notion of a *nudum pactum* first came into *our* law. He said, it was echoed from the *civil law*:—"Ex nudo pacto non oritur

"*actio*." *Vinnius* gives the reason, in *Lib. 3. Tit. De obligationibus*, 4to edition, 596. If by *stipulation*, (and *a fortiori*, if by *writing*), (d) it was good *without* consideration. There was no *radical* defect in the contract, for want of consideration. But it was made requisite, in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view, either *writing* or certain *formalities* were required. *Idem*, on *Justinian*, 4to Edit. 614.

Therefore it was intended as a guard against rash inconsiderate declarations: but if an undertaking was entered into upon *deliberation and reflection*, it had activity; and such promises were *binding*. Both *Grotius* and *Puffendorf*, hold them *obligatory* by the law of nations. *Grot. Lib. 2. c. 11. De Promissis. Puffend. Lib. 3. c. 5.* They are *morally* good; and only require *ascertainment*. Therefore there is no reason to *extend* the principle, or carry it *further*.

There would have been no doubt upon the present case, according to the *Roman* law; because here is both *stipulation* (in the express *Roman* form) and *writing*.

Bracton (who wrote * *Temp. Hen. 3.*) is the first of our lawyers that mention this. His writings interweave a great many things out of the *Roman* law. In his third book, *Cap. 1. De Actionibus*, he distinguishes between *naked* and *cloathed* contracts. He says that "*obligatio est mater actionis*;" and that it may arise *ex contractu*, *multis modis; sicut ex conventionione, &c. sicut sunt pacta, conventiona, quæ nuda sunt aliquando, aliquando vestita, &c. &c.*

Our own lawyers have adopted exactly the same idea as the *Roman* law. * *Plowden*, 308. *b.* in the case of *Sheryngton and Pledal v. Strotton and others*, mentions it: and no one contradicted it. He lays down the distinction between contracts or agreements in *words* (which are more base,) and contracts or agreements in *writing*, (which are more high,) and puts the distinction upon the *want* of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the *Roman* lawyers had said. "*Words* pass from "*men lightly*:" but where the agreement is made by *deed*, there is more *stay*: &c. &c. For, first, there is &c. &c. And, thirdly, he delivers the writing as his deed. "The *delivery* of the deed is a ceremony in law, signifying fully his good will that the thing in the deed should pass from him who made the deed, to the other. And therefore a deed, which must necessarily

1765.

PILLANS
and ROSE
V.MIEROP &
HOPKINS.* Sub ultima
tempora
regis H. 3.[1671]
* This probably was
Plowden's own argument. I suppose, he was himself that apprentice of the Middle Temple who argued for the defendants.

(d) This was denied by Baron *Eyre* in *Cam. Scac. Nov. 27, 1776*; and so it was by all except the *Ch. Bar.*

See *Pratt v. Hughes* 7 Term R. 350 note:

1765. "be made upon great thought and deliberation, shall
 PILLANS "bind without regard to the consideration."
 and ROSE The *voidness* of the consideration is the *same*, in reality,
 v. in both cases: the *reason* of adopting the rule was the
 MIEROP & *same*, in both cases; though there is a difference in the
 HOPKIN. *ceremonies* required by each law. But *no inefficacy* arises
merely from the naked promise.

Therefore, if it stood only upon the naked promise,
 its being, in this case, reduced into *writing*, is a *sufficient*
guard against surprise; and therefore the rule of *nudum*
pactum does not apply in the present case.

I cannot find, that a *nudum pactum evidenced by writ-*
ing has been ever holden bad: and I should think it
 good; though, where it is *merely verbal*, it is bad; yet
 I give *no opinion* for its being good, *always*, when in
writing. (e)

Many of the old cases are strange and absurd: so also
 are some of the modern ones; particularly, that of *Hayes*
v. Warren.*

* V. 3 Sir
 J. S. 939.

I have a very full note of this case. The reason of the reversal of the judgment
 was, "that it did not appear by the declaration, to be either for the benefit, or at
 "the request of the defendant."

It is now settled, "that where the act is done *at the*
 "request of the person promising, it will be a sufficient
 "foundation to graft the promise upon."

[1672] In another instance, the strictness has been relaxed:
 † Church and as for instance, † burying a son; or ‡ curing a son;
 Church's case; the considerations were both *past*; and yet holden good.
 cited in Sir T. It has been melting down into common sense, of late
 Raym. 260. times.
 † V. 2 Leon.
 111.

§ For, between
 Ireland and
 Holland, each
 usance is one
 month.

However, I do here see a *consideration*. If it be a
departure from any right, it will be *sufficient* to grant a
verbal promise upon. Now here, *White*, living in *Ireland*,
 writes to the plaintiffs "to honour his draught for 800l.
 "payable ten weeks after." The plaintiffs agree to it,
 on condition that they be made safe at all events.
White offers good credit on a house in *London*; and
 draws: and the plaintiffs accept his draught. Then
White writes to them, "to draw on *Van Mierop* and
 "*Hopkins*:" To whom the plaintiffs write, "to inquire
 "if they will honour their draught: they engage" that
 "they will." This transaction has *prevented*, *stopt*, and
disabled the plaintiffs from calling upon *White*, for the
 performance of his engagement. For, *White's* engage-
 ment is *complied with*: so that the plaintiffs could not

(e) This was denied by the judges and three barons
 in the Exchequer chamber, Nov. 27th, 1776. 7 Term Rep
 350, note *Nathan v. Hughes*, -

call upon *him* for this security. I do not speak of the money; for, *that* was not payable till after two usances and a half. But the plaintiffs were prevented from calling upon *White* for a performance of his engagement "to give them credit on a good house in London, for reimbursement:" so that here is a good consideration. The law does not weigh the *quantum* of the consideration. The suspension of the plaintiffs' right "to call upon *White* for a compliance with his engagement" is sufficient to support an action; even if it be a suspension of the right, for a day only, or for ever so little a time.

BUT to consider this as a *commercial* case. ALL nations ought to have their laws conformable to each other, in such cases. *Fides seroanda est; simplicitas juris gentium praevalat.* *Hodierni mores* are such, that the old notion about the *nudum pactum* is not strictly observed, as a rule.

On a question of this nature, "whether by the law of nations, such an engagement as this shall bind—" the law is to judge.

The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having or being supposed to have effects in hand; but for the convenience of trade and commerce. *FIDES est servanda.* An acceptance for the honour of the drawer, shall bind the acceptor: so shall a verbal acceptance. And whether this be an actual acceptance, or an agreement to accept, it ought equally to bind. An agreement to accept a bill "to be drawn in future" would (as it seems to me) by connection and relation, bind on account of the antecedent relation. And I see no difference between its being before or after the bill was drawn. Here was an agreement sufficient to bind the defendants to pay the bill: agreeing "to honour it," is agreeing to pay it.

I see no sort of fraud. It rather seems as if the defendants had effects of *White's* in their hands. And it does not appear to me, that the defendants would have honoured the plaintiffs' draughts, even though they had known that it was future credit.

But whether the plaintiffs or the defendants had effects of *White's* in their hands, or not; we must determine on the general doctrine.

And I am of opinion, that there ought to be a new trial.

Mr. Justice YATES was of the same opinion. He said it was a case of great consequence to commerce; and therefore he would give both his opinion and his reasons.

1763.

PILLANS
and ROSE

v.

MIERGP &
HOPKINS.

The arguments on the side of the defendants terminate in its being a *nudum pactum*, and therefore void.

This depends upon two questions.

1st Question—"Whether this be a promise without a consideration;"

2d Question—"If it is, then "whether this promise shall not be binding, of itself, without any consideration."

First—The draught drawn by *White* on the plaintiffs, payable to *Clifford*, is no part of the consideration of the undertaking by the defendants. The draught payable to *Clifford* is never mentioned to the defendants. They are asked "whether they will answer a draught from the plaintiffs upon them:" they answer "they will honour such a draught on them."

Whether the defendants had or had not effects of *White's* in their hands, is immaterial.

ANY damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding; though no actual benefit accrues to the party undertaking.

Now here, the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs. It is plain that the plaintiffs would not rely on *White's* assurance ONLY: but wrote to the defendants, to know if they would accept their draughts. The credit of the plaintiffs might have been hurt, by the refusal of the defendants to accept *White's* bills. They were or might have been prevented from resorting to him, or getting further security from him. It comes within the cases of promises, where the debtee forbears suing the original debtor.

Second question—Whether, by the law of merchants, this contract is not binding on the defendants; though it was without consideration.

The acceptance of a bill of exchange is an obligation to pay it: the end of their institution, their currency, requires that it should be so. On this principle, bills of exchange are considered, and are declared upon as special contracts; though, legally, they are only simple contracts: the declaration sets forth the bill and acceptance specifically: and that thereby the defendants, by the custom of merchants, became liable to pay it.

This agreement "to honour their bill" was a virtual acceptance of the bill. An acceptance needs not be upon the bill itself: it may be by collateral writing. *Wilkinson v. Lutwidge*, 1 *Strange*, 648.

A promise "to accept" is the same as an actual acceptance. And a small matter amounts to an acceptance; and so says *Molloy*, Lib. 2. c. 10. § 20. and an acceptance will bind, though the acceptor has no effects

+ 16 Jan 37
* V. Coggs
v. Bernard,
2 Ld. Raym.
919. [See
also 2 Hen. Bl.
315. 4 East,
461.]

[1674]

[1 East, 100.
4 East, 68.]

[Ratio optima
ut mihi vide-
tur.]

of the drawer in his hands; and *without any consideration*.
Symons v. Parminter,* *Hil.* 1747. 21 G. 2. B. R.
 And a bill accepted *for the honour of the drawer*, will also
bind.

1765.

FILLANS
and ROSE

V.

MIEROP &
HOPKINS.

Then he applied these positions to the present case.
 It was an acceptance of this very draught, *by relation*
and connexion; though the bill was not then drawn by
 the plaintiffs on the defendants.

* This was on
 a motion for
 arrest of judg-
 ment. The
 judgment was
 affirmed (ex
 parte) in com.
 Proc. with
 100l. costs,
 upon or soon
 after 30th Feb.
 1748.

But even if it did not amount to an *actual* acceptance,
 yet it would *equally bind* the defendants: they would
 be equally obliged to perform the *effect* of their under-
 taking.

The plaintiffs apprized the defendants of their *inten-
 tion to draw*; and the defendants promised "to honour their
 "draught"; and the plaintiffs, of course, would regulate
 their conduct accordingly.

Therefore upon the whole circumstances of this
 transaction, 1st, there is a consideration: and 2dly, if there
 was none; yet, in this *commercial* case, the defendants
 would be bound.

[1 Will. 165]
 [1675]

Mr. Justice ASTON—I am of opinion "that there
 "ought to be a new trial."

If there be such a custom of merchants as has been
 alledged, it may be *found* by a jury: but it is the *court*,
 not the jury, who are to determine the law.

This must be considered as a *commercial* transaction
 and is a plain case. The defendants have undertaken to
 honour the "plaintiffs' draught." Therefore they are
 bound to pay it.

This cannot be called a *nudum pactum*. The answer
 returned by the defendants is an admission of "having
 "effects of White's in their hands," if that were necessary.
 And after this promise "to accept" (which is an implied
 acceptance) they might have applied any thing of White's
 that they had in their hands, to this engagement; even
 though White had drawn other bills upon them in the
interim. The defendants voluntarily engaged to the
 plaintiffs; and they could not recede from their engage-
 ment. [4 Durn. 339]

As to its being a *nudum pactum* (which matter has
 been already so well explained—) If there be a turpitude
 or illegality in the consideration of a note, it will make
 it void, and may be given in evidence: but here nothing
 of that kind appears, nor any thing like fraud in the
 plaintiffs. Here was full notice of all the facts; a clear
 apprehension of them by the defendants; a question put
 to them, "whether they would accept;" and their an-
 swer, "that they would."

Upon the whole he concurred, "that an action will lay

1765. "for the plaintiffs against them: and that the plaintiffs
"ought to recover."

By the COURT, unanimously,

THE RULE "to set aside the verdict, and for a
"new trial," was made ABSOLUTE.

[1676]

Thursday, 2d
May 1765.

LOCKWOOD versus Dr. COLSGARNE.

A domestic
physician not
protected by
an ambassador
retainer.

See Lib 5 42 191.2

UPON shewing cause (on *Saturday* 27th of last month) why execution should not be set aside, and the goods taken in execution by the plaintiff, restored to the defendant.

The facts appeared upon the affidavits, to be as follows, as nearly as I could take them, upon the reading.

The defendant had been protected by the *Morocco* ambassador: upon whose departure from *England*, the plaintiff proceeded against the defendant, being then unprotected; and obtained judgment against him. The defendant brought a writ of error. Whilst this writ of error was depending, viz. on 14th of *June* 1764, he was hired to Count *Haslang*, the *Bavarian* minister, as his physician at 40l. a year salary; though Dr. *Redmond* then stood upon the list, as physician to Count *Haslang*; and even still remains upon the said list, as such. The defendant swore, that he had prescribed to some of the count's servants: and he also swore, that since the said 14th of *June* 1764, he never prescribed to any other persons but the count's family. It appeared that the defendant kept a coach, and had livery servants of his own. It appeared that he had formerly been a trader; but had left off; but it was not ascertained where, or for how long time, he had practised as a physician. Soon after he was hired to Count *Haslang*, the count's own secretary sent to the sheriff of *Surry* (who had an execution against the defendant,) to acquaint him "that
"the defendant was protected by Count *Haslang*."

The question was, "whether the defendant was intitled to the * privilege of a foreign minister's domestic servant, viz. physician to Baron *Haslang*;" that is, whether he was really and bona fide his servant; or, whether it was only a collusive hiring, a colourable service, a mere sham and pretence, in order to screen him from paying his just debts.

It was then adjourned.

Lord MANSFIELD now observed upon the act of 7 Ann. c. 12. that there is not an exception in it, but what is agreeable to and taken from the law of nations.

The privilege of a foreign minister extends to his family and servants; and this privilege has been long

* V. 7 Ann.
c. 12. and V.
ante, p. 1478.
Bath's case,
S. P. fully
discussed.

settled, to extend to the servants who are natives of the country where he *resides*, as well as to his foreign servants, whom he *brings over with him*. 1765. LOCKWOOD

By the law of nations, a foreign minister cannot give a protection to a person who is not *bond fide* of his family. V. COYS-GARNE.

The question therefore is, "whether this defendant is "*bond fide* a domestic physician to a foreign minister;" (I do not mean that it is necessary that he should *lie* in his house.)

His lordship occasionally took notice of the negligent manner in which the lists are kept at the sheriff's office; and then proceeded, to the purport following.

As to the question "whether this is a *bond fide* service, "or merely *colourable*."—It does not appear, that this defendant *ever prescribed* to any one person in the world, as a physician, *before* he was hired by Count HASLANG. Then he was hired on the 14th of *June* last, just when he found it necessary to be *protected from this debt*. And Dr. *Redmond* then was and now remains upon the list, as the count's physician. This man's very *retainer* is in the *form* of a protection from his debts: which is a *suspicious* circumstance. Then what has he *done*, as a physician? He swears he has prescribed to *some* of the servants; but *no particulars* are specified. He lives at *Vauxhall*; and keeps a *couch and livery servants*.

Binkershoek, de Foro Legatorum, says, "that a *person* "in debt cannot be taken into the service of a foreign "minister, in *order to protect* him." And indeed this would give a foreign minister a power to dispense with the private debts of the subjects of this country.

Now here was actually *judgment against him*; only *suspended* by a writ of error. He was *before protected* by the *Morocco* ambassador; and when he went home, then the defendant got this protection. *Kellerhoff*, Count *Haslang's* secretary, *soon after* sent to the sheriff of *Surry*, who had an execution against him; acquainting him "that this man was *protected* by Count HASLANG." The secretary himself swears this: which shews the view to have been the *protection*. But a foreign minister cannot *protect*, by way of screening a debtor from paying his just debts. He has no such privilege.

Then his salary is but 40*l.* a year; and he swears "that "he never since the 14th of *Jun* prescribed to any other "person but the ambassador's family." And yet he lives [1678] in splendor, and keeps several livery servants. This *dilemma* is clear: *either* he had no patients before; or it was not really and fairly worth his while to quit his profession for a temporary salary of 40*l.* a year.

Therefore his lordship was clear, that this was not a

1763.
LOCKWOOD

v.
COYS-
GARNE.

fair *bonâ fide* transaction; and, consequently, that the defendant was not intitled to the privilege he now claimed.

At the same time, he declared, that the statute of 7 Ann. was only *declaratory* of the law of nations, and that the law of nations was in *full* force in these kingdoms.

Mr. Justice WILMOT concurred with Lord MANSFIELD, as to observing the act of 7 Ann. c. 12. in all cases properly and fairly brought within its true meaning and intent. But he was clear, that Dr. *Coyugarne* was not what he pretends to be; that is, a *real* physician. He owns he *has* been a trader; (though he has left it off;) but he does not ascertain *when* or *where* he practised as a physician. If he was not, why should the count retain him as a physician? And he is to have but 40l. a year, for board and service as a physician. Here is no proof of any of his prescriptions being ever taken by any of the count's family; nor even of their being made up; neither is it usual to retain physicians. Domestic physicians are not the custom of modern ages: though it was customary amongst the ancients. Therefore I have no doubt about this character that he claims, of a *domestic servant*. The profession of a physician is honorary: and the retainer should come from the ambassador; whereas this man *offered himself*; and it is plain enough that it was done with a *view to this protection*.

Therefore he does not appear to me to be the *domestic servant* of a foreign minister. He was before protected by the Morocco ambassador; he is gone home. Then after his departure, and when that pretence could no longer serve him, and the plaintiff had got judgment, he brings a writ of error, and gets this protection. But an ambassador can not protect; it is the law that gives the protection. Whereas here, the secretary sends notice to the sheriff "that the count has protected him." The view therefore is manifest: and the defendant does not seem to be intitled to the character that he has assumed.

It will be of a very bad consequence, if protections should be set up to sale, or made use of merely for the sake of screening people from paying their just debts.

[1679] The two other judges, Mr. Justice YATES and Mr. Justice ASTON, concurred, for the same reasons; being thoroughly satisfied, upon the circumstances of this case laid all together, and upon the whole complexion of it, "that this was *not* a *bonâ fide* service, but a scheme "to screen him from the payment of his debts." And Mr. Justice ASTON mentioned the case of *Wigmore v.*

Alvarez : (which see cited, together with others on this subject, ante, p. 1479. in *Bath's* case.)

1763.

Per Cur. ^{un}animously and clearly,

LOCKWOOD

v.

COYS-

GARNE.

RULE DISCHARGED.

Mr. *Walker* prayed that it might be discharged *with costs*. But costs were not added; because Mr. *Kelly*, the attorney who appeared to support the rule, declared in court (on Lord *Mansfield's* asking him "*who* was his employer.") "That he was concerned for *count Haslang* and employed and paid *by HIM*."

REX *versus* ELLEN TAYLOR late BENT.

SHE was brought up by *habeas corpus* from *Lancashire*; A married woman may be committed for not maintaining her previous bastard, pursuant to an order of two justices. [See 5 Durn. 157.] having been committed to the HOUSE OF CORRECTION at *Manchester*, for disobeying an order of two justices "adjudging her child to be a bastard, and ordering her to maintain it, by paying 8d. a week for so long time as the child should be chargeable to the parish;" there to remain without bail or mainprize, except she shall put in sufficient surety "to perform the said order, or else, &c." or be otherwise discharged by due course of law.

She was *unmarried* when the child was *born*; but was now *married to Taylor*.

Sir *Fletcher Norton*, (Attorney General) Mr. *Stowe*, and Mr. *Dunning*, for the defendant, objected first, to the warrant of commitment; alledging, that the justices of the peace had no power, under 18 *Eliz. c. 3.* to make this order upon her, for *her* maintaining the child; she being then a *married* woman, and incapable of having any *property*: so that she could neither pay money nor give security. And the husband was, in fact, incapable to pay it. Her *being* a married woman is apparent upon the return: and we have also proof of it, by affidavit.

To prove "that a *feme-covert, can not be charged*," they cited *Foley's Cases of Laws relating to the Poor*, [1680] p. 56. in point: and they insisted that the husband ought to have been summoned to shew cause against this order.

Second objection. By 18 *Eliz. c. 3.* They are obliged to commit to the *common gaol*; and in that case, she would have been intitled to charities: whereas this commitment is "to the *house of correction*;" where there is no such benefit. And as this was a new act of parliament, they were obliged to pursue it literally. They mentioned a case of *Rex v. Boys*: * where it was deter- * P. 26 G. 2. mined "that upon a new act of parliament, they are con- 1753. B. R. fined to the method prescribed in it."

They said that the 6 *G. 1. c. 19. § 2.* does not extend

1765.

REX

v.

TAYLOR,
late BENT.

to the present case. This is not a criminal, but a civil case. She has been *already* punished as a lewd woman. Therefore this case stands only on the 18 *Eliz.*

Contra, pro Rege, Mr. Morton, Mr. Wedderburne, and Mr. Wallare, answered the objections.

First, *non constat* that she ~~was~~ a married woman: but admitting "that she was;" yet matrimony can *not discharge* a woman from either a crime or its penalty: the husband takes her under this incumbrance.

This is not like cases under 43 *Eliz.* For under *this* act, it is a *punishment: Luat in corpore, si non habet in loco*. But under the 43 *Eliz.* the *having ability* is essentially requisite to making any order grounded upon it.

In 11 *Rep.* 61.—Dr. Foster's case—it was determined, that a feme covert was within 1 *Eliz. c. 2. § 14.* and shall forfeit for not going to church. And in 2 *Strange* 1120, *Rex v. Crofts*, a feme covert may be convicted on 9 *G. 2. c. 23.* for selling gin.

Secondly, the house of correction is *preferable* to the common gaol. Besides, this case is within the 6 *G. 1. c. 19. § 2*, which impowers the justices to commit vagrants and *other* criminal persons charged with *small offences*, *either* to the common gaol, *or* house of correction, as they shall think proper. For the act says * "and whereas vagrants and *other* criminals, offenders, and persons charged with small offences, are for such *offences*, *or for want of sureties*, to be committed to the county-gaol," it enacts that they may commit such vagrants and *other* criminals, offenders, person and persons, *either* to the common gaol, *or* house of correction, as they in their judgment shall think proper. And this woman is within the words, "*other* offenders," and "*other* persons." This is a commitment for an *offence*; and is (in the words of the act of 18 *Eliz. c. 3.*) "till she shall find such surety as aforesaid, or be otherwise discharged by due course of law." They cited *Rex v. Davis, M. 28 G. 2. B. R.* where an *indictment* was holden to lie against a parish-officer, for refusing to receive a pauper regularly removed to his parish: though it was objected, "that it was a *new* offence, so made by the act of 3, 4 *W. & M. c. 11. § 10.* which act gives a particular penalty; and that therefore it was not indictable." However this is one of the small offences mentioned in 6 *G. 1. c. 19. § 2.*

Lord MANSFIELD—1st. A *feme-covert* is liable to be prosecuted for *crimes* committed by her. This woman has disobeyed the order of the justices: and the 18 *Eliz. c. 3.* prescribes the punishment here in-

* V. 6 G. 1.
c. 19. s. 2.

[1681]

[Str. 1120.
Cald. 133.]

flicted upon her. There is no need to summon the *husband*, in a *criminal* prosecution against the wife.

2dly. It is within 6 G. 1. c. 19. § 2. She is committed for an offence; and for want of sureties. It is therefore within the provision of that act, and a legal commitment: and it is better for her, than a commitment to the common gaol.

Mr. Justice WILMOT had no doubt about it.

1st. The 18th of *Eliz.* expressly considers the producing bastards, as an *offence*: not only the getting or bearing the child, but the leaving it to be a burthen on the parish, and defrauding the relief of the true poor of it. Therefore the justices may order a proper *punishment*; and also take order for the maintaining the child, in relief of the parish: they may do *either*, or *both*.

Matrimony does *not purge* the *crime*; she is still the object of the law, as to *criminal* jurisdiction. So was the case of the woman selling * gin. There was no * 2 Sir J. S. need to summon the *husband*. The husband is not liable 1120. (a) for the *criminal* conduct of his wife.

2dly. And if it be a crime, she is a *criminal offender* within 6 G. 1. and may be committed to *either* prison, as the justices think proper. And it is for the ease, benefit and advantage of the party committed, to send her to the house of correction, rather than to the common gaol.

The order mentioned by Mr. *Poley* was made upon a *feme covert* "to keep her grandchild." But such orders made upon parents and children "reciprocally to maintain each other," are not upon the foot of *criminality*; but to give a *moral* obligation a *legal* efficacy. [1682]

As to the conclusion of the commitment—The words of the act are pursued. The addition of—"and until discharged by due course of law;"—is only *nimia cautela*, and *non nocet*; it can not vitiate the former part of the order.

Mr. Justice YATES concurred.

1st. All *offences* are *personal*; and no change of the offender's circumstances can *discharge* her. The *husband* was no object of this law: therefore there was no need to summon *him*.

2dly. It is good, within the 6 G. 1. *though* it had been bad under 18 *Eliz.*

(a) And it appears from a full manuscript note of that case, (16 MS. 202.) that there she did the act voluntarily; and the court held that if it had been by compulsion of the husband, that would have been a proper defence, and he then would have been the person who ought to have been convicted.

1765.

REX

V.

TAYLOR,

late BENT.

1765.

Mr. Justice ASTON concurred likewise : and said it was a clear case.

Per Cur. unanimously,
REMANDED.

[S. C. 1 Bl.
593]

V. ante, p.
1586 to 1591.

Too late to
object to plea
roll after de-
fendant has
paid for issue.

COMBE Esq ; *versus* PITT.

THE defendant's counsel having moved for a new trial, pursuant to the liberty reserved for them, as is mentioned in pages 1586 and 1591 ; cause was now shewn, and allowed : and, consequently, the rule discharged.

The objection was to the *plea-roll*, which contained nothing but the declaration and the plea of *nil debet* ; whereas there was a plea in *abatement*, which had been demurred to, but had never been deserted, nor any judgment upon it entered on the roll, before *nil debet* was pleaded, (as the counsel for the defendant alledged ;) and which the plaintiff ought not to have dropped, but ought to have entered it on the roll. This, they said, was an *irregularity* which would vitiate the whole : and the *acceptance* of the issue (in which this plea in *abatement* was omitted) could *not cure* it.

[1683]

But THE COURT held this irregularity to be *cured* by the defendant's *accepting* the issue, and *paying* for it. His objection ought to have been made at *that* time : it is *too late* to make it *now*.

RULE DISCHARGED.

Friday, 3d
May, 1765.

Information
will lie for dis-
turbance a dis-
senting con-
gregation.

RAX *versus* WROUGHTON, Esq ; and others.

ON shewing cause against an *information* for a *misdemeanour*, in *obstructing divine service* in the church, and grossly insulting the rector—*Pewsey* was the name of the church : and the rector's name was *Townshend*. The particular circumstances were long and minute : enough of them will appear from what the court said. It is sufficient to hint, that Mr. *Townshend* was a well-wisher to the *methodists* ; that he had admitted one of them into his pulpit ; and that Mr. *Wroughton*, a justice of peace residing in his parish, disapproved of it, and strenuously opposed it.

After hearing the affidavits and arguments of the counsel on both sides—

LORD MANSFIELD declared that he always understood " that a preacher must have a *licence* from the bishop of the " *diocese wherein* he so preached : " and " that a licence " from the bishop of a *particular diocese* would not give " the person authority to preach in *every diocese*, nor in " any *other diocese*." Indeed this is very seldom disputed :

but if it be disputed, he took it to be in *strictness* so, by the canons. 1765.

REX

V.

WROUGHTON

TON

and others.

In the present case, he thought the court should not interpose, upon the application of Mr. *Townshend* (the rector :) because he had *suppressed* truth, and thereby *misrepresented* the case ; and also for another reason, viz. that Mr. *Townshend* was going out of the way of the general and usual course of celebrating divine service in the established church. Again, there was an *inhibition*, which had been obtained against Mr. *Townshend* from the bishop of the diocese ; who had commissioned Mr. *Wroughton* to see it complied with. Further Mr. *Townshend* himself behaved improperly, by particularly marking Mr. *Wroughton*, and preaching personally at him in his sermon. And it seemed to him, that the *blow* complained of was not a blow struck Mr. *Townshend* by Mr. *Wroughton*, (as is charged upon him :) but an *accidental* brushing him with his finger.

Therefore, there is no reason for the court to interpose in an *extraordinary way*, in this case as it is circumstanced. [1684]

Otherwise, I would have it understood, in general, that *methodists* have a right to the *protection of this court*, if interrupted in their decent and quiet devotion : and so have *dissenters* from the established church likewise, if so disturbed.

Mr. Justice WILMOT was of the same opinion, for the same reasons. Here is a total *suppression* of truth and facts on Mr. *Townshend's* side, who makes this application : and upon the whole of the affidavits, I see no misbehaviour in Mr. *Wroughton* ; and *very great* misbehaviour in Mr. *Townshend*. Mr. *Wroughton* applied to the bishop, attended him, and was directed by him to take care " that no *unlicensed* preacher should preach in the church of *Pewsey* ;" and the bishop actually issued an inhibition, which Mr. *Townshend* defied and disobeyed. And the blow is sufficiently accounted for, as quite an accident, and not intended at all as a *blow*.

He added that he took the law about *licences* to be as Lord *Mansfield* had stated it : it must be a licence from the bishop of the *diocese* : (though in *practice*, it is not so used.) *Strictly*, the bishop of the diocese is to licence all who preach in it.

Mr. Justice YATES concurred, for the same reasons : and added—" with costs ;" because he had *suppressed the truth*.

Mr. Justice ASTON concurred with Mr. J. *Yates* ; as the court would *not* have put Mr. *Wroughton* to the expence of defending himself against this

1765. rule, if the whole circumstances of the case had been disclosed.

Per Cur.—Let the rule be discharged, *with costs*.

Tuesday, 7th
May, 1765.
[S. C. 1 Bl.
343.]

Estate in fee
held to
pass to a trustee
by inference of testator's intention,

[1685]
tion, without
the word
"heirs," or
other technical
words.
[See also
8 Vin. 69.
2 Vez. 521.
8 Vin. 72.
pl. 26.]

OATES, ex dimiss. MARKHAM, *versus* COOKE.

THIS was an action of trespass and ejectment; to which the defendant pleaded the general issue.

It appeared in evidence, that GEORGE BEAUMONT being seised in fee of the tenements in question, five acres whereof were *copyhold* holden of the manor of *Wakefield*, and the rest were *freehold*, duly made his last will and testament in writing, bearing date the 29th day of *September* 1760: (which will was set out verbatim, in the case.) The substance of it was as follows. He gives several sums of 3l. a year, to divers persons; some, for life; some, in fee: one of which annuities for life he expressly directs to be paid by his trustee or executor; and afterwards adds—"these legacies to be faithfully paid by my trustee John Cooke, every year and yearly, a month after *Martinmas*." He then gives several small legacies. He wills and desires, "that *William Frith* shall not be removed from his farm, upon any account whatsoever, during his natural life; he paying the same rent as usual: he leaving the farm, whoever come into it, to pay after the yearly rent of 9l. And his decease, the same." Then immediately follows—"I do also leave unto my trustee and executor, out of the yearly rents of the farm, 1l. 10s. a year, and yearly, for repairs and other uses of the farm." He afterwards leaves to his trustee and executor, 3l. for sawing out the rough ing: and 5l. to build a tomb for him, in *Tankersley* church-yard: "he and his heirs always to see that it be kept in order." Then he gives several directions, and several more legacies. "And I do hereby constitute JOHN COOKE before mentioned, sole executor and trustee of this my last will and testament; he paying all my just debts, legacies, and funeral charges." "Delivered by the aforesaid testator, to be his last will and testament in the presence of witnesses surrendered according to law. *James Brooks. Edward Lloyd. Thomas Butler*." And further I desire that the bed with all the furniture thereunto belonging, standing in the closet, be left there, particularly for my trustee that when he pleaseth to come over, he may lodge there without let, molestation, or hindrance."

After the making of the said will, to wit, on the 8th day of *April* 1761, the said *George Beaumont* surrendered the said *copyhold* tenements to the use of his will; and afterwards died seised of the said premises, respectively,

in manner aforesaid; leaving *John Smith, John Parkin, Thomas Beaumont*, and the lessor of the plaintiff, his nephews and co-heirs at law.

1765.
OATES
ex dimiss.
MARKHAM
v.
COOKE.

The question was, "whether any estate, and what passed to JOHN COOKE the trustee."

Mr. *Walker* argued for the plaintiff: Mr. *Fenton*, for the defendant.

On behalf of the plaintiff, the heir at law, it was urged, that there was nothing to disinherit him: and the intention of the testator is uncertain.

On the contrary, for the trustee, it was insisted, that he took a legal estate; and therefore the heir was barred. And to prove "that he took a fee, by necessary implication," the cases of *Shaw v. Weigh*, 2 *Strange*, 793. *Willis v. Lucas*, 1 *Peere Williams*, 472. *Collier's case*, 6 Co. 16. and *Ackland v. Ackland*, 2 *Vern.* 687. were cited and relied on. [1686]

THE COURT were all clear, "that both the freehold and "copyhold passed to *John Cooke*, the trustee, in fee."

LORD MANSFIELD declared, he had not a particle of a doubt. The intention is to be collected from all the parts of the will: and it must be clear; or else the heir at law shall not be disinherited. But here, the testator's intention is most clear, "that he meant to devise "his real estate, in trust."

Mr. Justice WILMOT concurred. *Cooke*, the trustee, took the legal estate, by this devise. The intention of the testator is to be collected from all the parts of the will taken together: and if it be thereupon necessary to imply it, it is the same thing as if it was particularly expressed. Now here are trusts to be executed, which the trustee could not execute and effectuate, without having an estate in fee devised to him. No particular technical terms are requisite: it is sufficient, if the implication be strong, violent, and necessary. And here it is so: (which he shewed, at large.)

Mr. Justice YATES was likewise of the same opinion; and held that the implication here was clear, plain, and necessary. The estate must be co-extensive with the charges: and here are annuities charged upon the real estate, and devised in fee. Therefore a legal estate was certainly intended to be devised to the trustee. [4 Durn. 46.]

Mr. Justice ASTRON concurred; declaring it to be a clear case in his opinion.

Per Cur.—unanimously,
JUDGMENT OF NONSUIT.

1765.

Tuesday, 14th
May, 1765.[S. C. and P.
Bull. 269.]Affidavit of
debt, as ap-
pears, insuf-
ficient.[See H. Bl.
634.]BRIGHT *versus* PURRIER.

THIS was an action brought upon a foreign bill of ex-
change, payable at the distance of 120 days. The
bill was refused to be accepted. The assignee thereupon
brought this action against the drawer, *within* the 120
days: who put in bail to the action.

Sir *Fletcher Norton* and Mr. *Walker* moved, on *Thursday*
last, on behalf of the defendant, to set aside the plaintiff's
proceedings, for irregularity, insisting, that this action
was brought *prematurely*; for, it must be presumed, they
said, that there was, at the time the bill was drawn, a
consideration given for the *forbearance* of payment for the
120 days.

But THE COURT had great doubt about this: they were
not satisfied that the plaintiff's right remained suspended
for 120 days.

Whereupon the counsel for the defendant turned their
motion, "that the defendant should be discharged on
"common bail," upon the insufficiency of the *affidavit*
made by the plaintiff in order to hold him to bail: (which
affidavit was only by way of reference, "*as appears by a*
"bill of exchange, &c.")

A RULE was then made to shew cause: which
rule was now made ABSOLUTE.

Wednes. 15th
May, 1765.Attorney not
bound to
obey a sub-
pœna duces
tecum to
prove a for-
gery against
his own client.REX *versus* SAMUEL DIXON.

A Subpœna out of the Crown-office had been served
upon Mr. *Samuel Dixon*, an attorney, with a *duces*
tecum of certain papers hereafter mentioned; to give evi-
dence before the grand jury of the county of *Northampton*,
at the last assizes there; and to produce three vouchers
which had been produced and insisted upon by one Mr.
Peach, Mr. *Dixon's* client, before a master in Chancery;
and this subpœna with the *duces tecum* was in order to
found a prosecution by way of indictment against *Peach*
(who had produced these vouchers before the master,)
for *forgery*. Mr. *Dixon* did not appear before the grand
jury, in obedience to this subpœna: Whereupon,

[1688] On *Monday* the 6th instant, Mr. *Wallace* moved on
behalf of the prosecutor, for an attachment against him,
for refusing to appear; and had a rule to shew cause.

Mr. *Caldecott* now shewed cause. He insisted that Mr.
Dixon could give no other evidence, but of what had been
communicated to him by his client, IN CONFIDENCE:
and therefore he was *not compellable* to produce these
papers against his client, in order to prove him guilty of
a forgery.

Lord MANSFIELD was clearly of this opinion: and that Mr. *Dixon*, instead of producing them against his client, ought to have, immediately upon receiving the *subpœna*, delivered them up to his client.

1765.
REX
v.
DIXON.

Mr. Justice WILMOT concurred that he ought not to have produced them against his client.

Mr. Justice YATES was of the same opinion; [6 Ves. 281.] and thought the rule ought to be discharged with costs.

RULE discharged, with costs.

N. B. These were *not* papers that had been detained or impounded by the court of Chancery; but remained in Mr. *Dixon's* hands, as papers belonging to his client *Peach*, who had produced them as vouchers to his account; and which were afterwards returned to Mr. *Dixon* as his solicitor.

SURMAN versus SHELLETO.

MR. *Harvey*, made a motion for full costs; though the jury had found only 1s. damages. They had given 40s. costs.

It was an action for * words: and there was a colloquium laid about the plaintiff's trade; and also a special damage laid, of his having lost his business by reason of the speaking of the words. The words in question were contained in the 3d count; on which 3d count, the verdict was taken: and they were these—"Thou art a rogue; and thou hast cheated me of several pounds."

The rule, he said, was "that where the words are not actionable in themselves, there shall be full costs, if special damages are laid; though the damages found be under 40s." And to shew, that these words are not in themselves actionable, he cited *Hardr. & Wake v. Chapman et ux.* and 5 Mod. 398. *Savage v. Robury*.

Indeed, if the words spoken are in themselves actionable, and less damages found than 40s. there shall not be full costs; except there be a colloquium, and special damages laid, as a substantive and independent injury.*

But THE COURT held the latter words, "thou hast cheated me of several pounds" to be actionable; and told Mr. *Harvey*, he must be content with his 40s. costs.

MOTION DENIED.

In slander by words actionable if less damages are given than 40s. full costs are not payable, unless there is a colloquium and special damages laid.

[1689]
v. 21 J. 1.
c. 16. (as to 22, 23 C. 2.
c. 9. s. 149.
V. ante,
p. 1282, 1283,
1284.

See Mr. Serjeant Sayer's Law of Costs, Ch. 3. (p. 20 to 28.) and the cases there cited and discussed.

1765.

BUTTERWORTH and BARKER *versus* WALKER and
WATERHOUSE.

Prohibition
not to be
granted in a
matter not
essential.

SIR Fletcher Norton and Mr. Lee shewed cause against a prohibition to stop the Prerogative court of York from proceeding to grant a faculty for an organ in the church of *Halifax*.

The cause below was for obtaining a faculty for it: and there was a citation of the parishioners and inhabitants, to appear, and to "shew cause why an organ should not be erected in their parish-church." They did so: and their objection was, "that the plaintiffs below had not the consent of the parish." The answer was—"But we have the consent of the churchwardens; and there is also so large a subscription for erecting and maintaining it, that it will never be chargeable to the parish." And they also alledge the consent of a select meeting or vestry. The other side deny that the parish in general is bound by the consent of this select meeting or vestry. Whereupon the applicants for the faculty alledge, "that for twenty, thirty, or forty years, it has been usual to collect the sense and consent of the parishioners about all parochial matters, at such select meetings or vestries; and that the whole parish are, and for all the time allegate have been bound by the acts and consent of such select meetings or vestries."

[12 Mod.
416.]

Upon which, these parishioners who opposed the organ moved for a prohibition.

[1690]

The counsel who now shewed cause against it, not only contended, that the consent of the parish is not necessary; but also insisted that there is no ground shewn for a prohibition. For the applicants for the faculty only alledge, "that for twenty, thirty, or forty years, it has been usual to collect the sense and consent of the parishioners to all parochial matters, &c." and that "at one of these meetings, &c. &c." and "that for ALL the TIME ALLEGATE, it has been usual, &c." So that here is no custom in issue; nor any thing that the ecclesiastical court can not try: it is only alledged, that "for twenty, thirty, or forty years, it has been usual, thus to collect the sense of the parish." But there is no allegation of any immemorial common-law-custom: and therefore the ecclesiastical court may proceed. 2 Ro. Abr. 286. pl. 42, 43. Latch. 210. *Clarke v. Prowse*. A custom alledged in a libel, and denied by the defendant in the ecclesiastical court, may be there decreed against. The case between the church wardens and the rector of *Market-Bosworth*, in 1 Ld. Raym. 435. was so: and a prohibition was refused, after the sentence. That case gives the true reason of this court's issuing prohibitions to the spiritual court to inhibit them from trying customs: namely, "because

"they have *different notions* of customs, as to the time which *creates* them, from those that the common law hath. For, in some cases, the usage of ten years; in some, twenty; in some thirty years; make a custom in the spiritual court; whereas by the common law, it must be time whereof, &c." Which reason failed in that case; because they had there adjudged "that there was no such custom allowed by their law, which allows a less time than the common law does, to make a custom."

1765. *B. & W.*
MILLARS
and ROSS
v. THE
MILNERS &
WORKINS.

THE COURT observed, that the very ground of applying for the faculty, is, "that the parish are *not* to be burthened with the expence of this organ;" the very condition of praying it is, "that it is to be *maintained* by a subscription."

Mr. Wedderburne, who was for the prohibition, said that no matter of splendor or ornament in the church can be done *without the consent of the parish*.

Mr. Justice WILMOT asked him what authority he had for his position. He said, *he* knew no such doctrine.

Mr. WEDDERBURNE did not specify any particular authority for it; but went on to say that this court will not suffer the ecclesiastical court to proceed upon *temporal rights*; and here is a *temporal right* in the parish. Therefore, "whether it be laid *as a custom*, or not," is immaterial: the question is, whether a *temporal right* does not *intervene*. The parish can not be bound by the majority of a meeting of their representatives, or by their churchwardens.

Mr. Wallace, on the same side, observed that if the ecclesiastical courts allow the evidence of ten, twenty, thirty, or forty years to be a proof of a custom, the alledging a usage for such a time only, without alledging it to be immemorially, would be only an artifice to *elude* prohibitions to hinder them from trying immemorial customs. And if ornaments can be imposed upon the parish by the ordinary, without the consent of the parish, the parish will be bound to maintain them. He insisted that the ecclesiastical court have no such power as that of imposing them without the consent of the parish: and we deny any such consent; or any usage for the parish to be bound by such a meeting as this was.

LORD MANSFIELD—(directing his discourse to Mr. Wedderburne and Mr. Wallace) repeated the case. The ecclesiastical court issue a citation for the parishioners and inhabitants to appear and shew cause why this organ should not be erected in their church. They do appear. It appears to be applied for, upon a *subscription*:

Individual case
see up to 1765
17 Vin. 580.
see 5 Geo. 3. 1765
total churchwardens
can't make rate
without parish
1691
see Bac abt church

1765.

B. & W. ~~WILMOT~~
and ~~ROSE~~VAN
METER &
HOPKINS.

and a *consent by a select meeting* is alledged: but it is denied "that the parish are *bound* by such select meeting." Then it is alledged, that for twenty, thirty or forty years, it has been the usage "that the parish in general are *bound*" by such a select meeting." Upon this you apply for a prohibition.

But his lordship did not, at present, declare any opinion.

Mr. Justice WILMOT thought they were proceeding below, upon a *mistake*. The citation must be intended to have been issued, for the parishioners to shew "whether they have any *temporal rights* that will be *in-jured* by setting up an organ." But, the consent of the whole parish can not be essentially necessary to the ordinary's setting up an organ: nor would the parish be bound to repair it, when set up.

Now if the consent of the parish is *not* necessary, then all these proceedings below are *nugatory*. It seems as if they did think such consent to be necessary: and I own, that if the *consent of the parish were necessary*, I should think the prohibition ought to go; because the consent of the *vestry* can not bind the *whole parish*, without *immemorial* usage.

[1692]

Mr. Justice YATES also thought a prohibition ought to go, if there were any temporal right to be determined. For a usage of thirty or forty years is not sufficient: it can be no valid custom, unless it has been used *time out of mind*.

This suit, he said, below, seems to me to be totally *nugatory*.

[Salk. 164.]

Parishioners can not be *charged with new ornaments*, without their consent, as well as that of the ordinary. The citation might be intended only to prevent injury being done to the property of their private seats in the church.

Both sides here seem to have thought the consent of the parish necessary; which it is *not*.

Mr. Justice ASTRON—If proper trial of the custom is eluded by alledging a usage of forty, thirty, or twenty years, I should think Mr. Wallace's observation to be right.

The parish may be used to meet and consider of necessary repairs: but they can not preclude the ecclesiastical court from ordering an organ, or any thing else within their cognizance.

This organ is stated to be provided by *voluntary contribution*. The citation was issued in order to receive reasons against injuries that might happen to the private property of the parishioners.

But the ecclesiastical court does not encroach upon or

22 B. & W. Just.
to Shew IV.
to the Just. 9/15

interrupt the meetings of the churchwardens about such things as belong to them; nor draw the cognizance of them to a different forum.

Lord MANSFIELD—The ground we go upon is “that a prohibition will not be material.”

RULE DISCHARGED.

MONEY, WATSON, and BLACKMORE, *versus* DRYDEN LEACH.
(In Error.)

SOON after the court sat, the Lord Chief Justice PRATT came personally into court, to confess (*ore tenus*) his seal put to a bill of exceptions in this case; pursuant to the requisition of the following writ, *viz.*

“GEORGE the third, &c.—To our trusty and well-beloved Charles Pratt knight, our chief justice of the bench, greeting.—Whereas we have lately been informed that in the record and process and also in giving of judgment in a plaint which was in our court before you and your associates, our justices of the said bench, by our writ, between *Dryden Leach*, and *John Money*, *James Watson*, and *Robert Blackmore*, in a plea of trespass, assault, and imprisonment, manifest error hath intervened, to the great damage of the said *John*, *James*, and *Robert*; which said record and process, for the error aforesaid, we have caused to be brought into our court before us; and now, on the behalf of the said *John*, *James*, and *Robert* we are informed, in our said court before us, that at the trial of the issue first joined between the said parties in the plea aforesaid, the council learned in the law of the said *John*, *James*, and *Robert* alledged on their behalf certain exceptions to the opinion then declared and given by you; and that the said exceptions were then and there written in a certain bill, to which you put your seal, at the request of the said *John*, *James*, and *Robert*, according to the form of the statute in such case made and provided; and the said *John*, *James*, and *Robert* have brought into our court before us the said bill with your seal put to the same as it is said; whereupon the said *John*, *James*, and *Robert* have besought us to do what further should seem meet to be done in this behalf, according to the form of the said statute; and forasmuch as by the said statute it is ordained, that in such case the justice whose seal shall be put to such exception be commanded to appear before us at a certain day, to confess or deny his seal: therefore we command you of the ascension of our Lord, wheresoever we shall

1765.

BILLANS
and ROSE

WATSON

MIEROP &
HOPEKINS.

Friday, 17th
May, 1765.

[S. C. 1 Bl.
556.]

Acknowledgment of a bill of exceptions by the chief justice of C. B.
[Vide post. 1742.]

[1693]

1763. " then be in *England*, to confess or deny the seal so put to
 MONEY, " the said bill of exceptions as aforesaid to be your seal,
 et al. " according to the form and effect of the said statute; and
 v. " that you bring with you, at the same time, this writ.
 LEACH. " Witness *William Lord Mansfield*, at *Westminster*, the
 " 24th of *April* in the fifth year of our reign."

N. B. The bill of exceptions, sealed by Lord Chief Justice *Pratt*, had been previously brought into this court, and was now in the hands of Mr. *Owen*, as secondary of the office of pleas: and all the proceedings, down to and including the abovementioned writ, were entered upon the rolls of this court.

[1694] The Lord Chief Justice *Pratt* being now come into this court, pursuant to the command contained in the said writ, delivered it to the Lord Chief Justice of this court; Mr. *Owen*, at the same time, delivering the original bill of exceptions into Lord *Mansfield's* hand. Whereupon Lord *Mansfield*, shewing to Lord Chief Justice *Pratt* the seal thereto affixed, asked him " whether that was his lordship's seal, or not." To which question, his lordship answering in the affirmative, Lord *Mansfield* redelivered the bill of exceptions to Mr. *Owen*; at the same time delivering to him the abovementioned writ, with orders " that it should be filed."

Note—There was no written return to this writ: but Mr. *Owen* proposes to indorse upon it—" Sir " *Charles Pratt* knight, the chief justice within named, personally appeared in the court of the lord the king before the king himself, &c. on the day of the return within written; and confesseth that the seal put to the bill of exceptions within mentioned is his seal."

The lord chief justice of the *Common Pleas* immediately retired, without sitting down: and the lord chief justice of this court attended him till he was got past the puisné judge, but not quite to the door of the court.

Saturday, 18th May, 1765. REX versus The INHABITANTS of BURTON BRADSTOCK.

This case is already printed and published, in the quarto-edition of my SETTLEMENT-CASES, No. 171. p. 531. See it abridged, in the table.

Monday, 20th May, 1765.

REX versus RIGHTON, Esq.

Not to pay costs for not going to trial pursuant to notice if not occasioned by the party's own default.

MR. *Coxe* shewed cause, on the part of the defendant, why his client should not pay the prosecutor his costs by him expended in this cause, for the defendant's not going to trial, in pursuance of his notice given for that purpose.

It was an indictment for refusing to take upon himself the office of borsholder: which indictment the defendant had removed by *certiorari*; and thereupon had (of course) entered into recognizance "to appear, plead, and try it at the next assizes." The defendant had obtained a rule for a special jury; and every thing was ready for trial: but *only five* of the special jury appeared; and *neither* side prayed a *tales*; (though the defendant had a *warrant* for a *tales* in his pocket.)

The question was, "whether, upon these circumstances, the defendant was obliged to pay costs for *not* going on to trial."

Mr. *Filmer*, for the prosecutor, urged very strongly, "that he was obliged to pay them."

Mr. *Core* argued, on the contrary, that the defendant had been guilty of *no default*; and that the *prosecutor* might have prayed a *tales*, if he had thought fit.

Mr. *Filmer* replied, that they were not provided with a *warrant* for a *tales*; because it was incumbent on the *defendant*, to go on to trial: and *he* had actually a *warrant* in his pocket, but would not use it.

THE COURT were unanimously of opinion, that the defendant had *not* been guilty of such a default as could render him liable to pay costs for not going on to trial: the *prosecutor* might have come prepared with a *warrant* for a *tales*, if he had thought proper.

RULE DISCHARGED.

1765.

MONEY
et al.

v.

LEACH.

[1695]

1696

TRINITY TERM,

5 GEO. 3. B. R. 1765.

Friday, 7th
June, 1765.

Jurors cannot
express their
disapproba-
tion of a ver-
dict after
given.

REX versus EDMUND THIRKELL.

HE had been convicted of an assault upon *Mary Amelia Halfpenny*, an infant under ten and upwards of five years of age, with intent to ravish her.

Eight of the jury signed a paper in his favour; intimating their *disapprobation* of the verdict, which they themselves had given.

On *Tuesday* the 7th of *May* last, he was brought up and committed.

Lord MANSFIELD then expressed great dislike of such representations made by jurymen, *after* the time of delivering their verdict. It might be of very bad consequence, to listen to such *subsequent* representations contrary to what they had before found upon their oaths; and which might be obtained by improper applications subsequently made to them.

Mr. Justice WILMOT also expressed the same dislike of such subsequent representations made by jurymen *after* their departure from the bar; and thought they ought to be totally disregarded.

Upon Lord MANSFIELD's report, it appeared that the child had also received the foul distemper from him.

He was, at that time, only committed to the custody of the marshal.

[Vide 2 Bur.
1040. Bull. 8.]

Mr. Justice WILMOT now pronounced the judgment of the court upon him; *viz.*

[1697]

To be set in and upon the pillory at *Charing-Cross*, for an hour, between the hours of twelve and two; to be imprisoned one year; to find security (himself in 100*l.* and his sureties each in 50*l.*) for his good behaviour for three years; and to pay a fine of 6*s.* 8*d.*

Monday, 10th
June, 1765.

REX versus OSBORN.

Indictment for
selling as two
chaldron

MR. Merton shewed cause against quashing an indictment for selling, as two chaldron of coals, a quantity of coals a less quantity, is not maintainable: it must be for selling by false measure

tity *defective* by so many bushels (in the indictment specified) of that quantity which a bushel *ought* by law to contain.

1765.

REX
V.

OSBORN.

He argued, that this is tantamount to an indictment for selling *by false measure*; and distinguished the present case from those of 1 Sir J. S. 497. *Rex v. Gibbs*, 1 Lord Raym. 442. *Rex v. Flint*, and 2 Salk. 687. S. C.

It is no objection to an indictment, to say "that a *civil action* might have been brought:" for, the person injured may take *either* method.

The case of *Rex v. Marks* in 1 Ld. Raym. 702. was an indictment for the unlawful taking, *vi et armis*, so much money (ten pounds) in *pecuniis numeratis*, of J. S. Mr. Eyre moved to quash it, because an action lies: *sed non allocatur*.

Therefore the court will not quash it *on motion*.

Lord MANSFIELD—A man may be indicted for selling *by false measure*: but this is *not so* charged.* If it had been charged, "that he sold *by false measure*; by a bushel which contained but so much, whereas the legal bushel ought to contain so much;" it had been another thing.

* See the cases in point of *Rex v. Wheatley*, ante, vol. 2. p. 1126 to 1131, and *Rex v. Dunage*, 1130. And *Rex v. Driffield*, and *Rex v. Combrune*, and other cases there cited.

Mr. Justice WILMOT and Mr. Justice YATES both concurred. The latter said, it was only a declaration turned into an indictment. The former mentioned *Rex v. Lewis*, P. 1755. 28 G. 2. in this court; which was an indictment for selling as gum-senega, what was *not* gum-senega; and that judgment was arrested: which was a very strong case, he said.

(Many cases in point were there cited by Mr. Serjeant Hewitt: and on Friday 9th May 1755, his rule "to arrest the judgment," was made absolute without opposition.)

Lord MANSFIELD—If there be no doubt of this indictment being bad, it is better for the prosecutor, to quash it on motion. And I take it, that it ought to be *expressly* charged "that the defendant sold them *by false measure*:" Whereas here, it is *not* expressly charged, but only left to be collected by implication.

Mr. Justice ASTRON thought that this selling short measure *instead* of full measure was worthy the attention of the legislature; although it might not be indictable at common law, unless charged to be *by false measure*. He agreed, that *this* indictment has not the proper averments.

Mr. Justice WILMOT—The reason why this is not indictable, is, because it is in every body's power, to prevent *this* sort of imposition: whereas a *false measure* is a general imposition upon the public, which can not be

[1698]

1765. well discovered. Yet he concurred with Mr. Justice ASTON, that this is an inconvenience which very much requires a remedy.

Per Cur. unanimously.
INDICTMENT QUASHED.

REX versus EUNDEM.

THIS was the same point as the last: and therefore the same rule was made.

INDICTMENT QUASHED.

REX versus JOHN STORR.

Indictment will not lie for a mere matter of trespass.

ON the last day of last Hilary term, Mr. Serjeant Hewitt moved to quash four indictments, being (as he said) for *private injuries* only; though laid "*vi et armis*:" and he had a rule to shew cause.

Mr. Attorney General now shewed cause why these four indictments (which he said were for forcible entries and detainers) should not be quashed.

[1699] The first was for unlawfully entering his yard, and digging the ground, and erecting a shed; and unlawfully and with force and arms putting out and expelling one Mr. Street the owner, from the possession, and keeping him out of the possession of it.

It was objected, "that this is only an action of trespass converted into an indictment."

But this is charged as an *unlawful* entry, with force and arms, upon the possession of Mr. Street.

There is no other difference between this case and

* In Easter Term, 1755, 28 G. 2. The court refused to quash that indictment, upon motion: and in Trinity following, they gave judgment for the king, upon demurrer. [And see 3 Barn. 358.]

* *Rex v. Bathurst and others*, Trinity term 1755, but that that was an entry with force and arms into a dwelling-house or a school-house with the appurtenances: *this*, into a yard and shed.

An entry with force and arms, unlawfully, upon the possession of another, and putting him out of possession, is an indictable offence; even though the person so entering has a right. And the court can not, before trial, say "that it was not with force and arms:" that must depend upon the evidence.

Therefore the court will not quash these indictments, on motion.

N. B. There was no other charge of violence, in the present case, besides the common technical term of *vi et armis*.

Mr. Justice WILMOT—In four of the counts in *Rex v. Bathurst et al.* "*manu forti*" (which was in the first) was omitted: and it was holden, "that any sort of force sufficient to support it might have been

" given in evidence, by virtue of the words *vi et armis*;
" though if ~~no~~ such evidence should be given upon the
" trial, the defendant ought to be acquitted."

1765.
Rex
v.
Storr.

Mr. Justice Aston mentioned, that he took
Mr. Justice DENISON to have said, that "*vi et armis*
" was *prima facie*, as good as *manu forti*."

* According
to my own
the degree of

note, his words were—" This is laid to be with force and arms: and the force must depend upon evidence."

Mr. Serjeant Hewitt, and Mr. Caldecott, *contra*, argued
insupport of the motion.

They took notice, that three of these indictments differ [1700]
from the fourth: the first is for erecting a shed, &c.
the second for erecting, &c. the third for cutting a bell-fry,
(which in *Lincolnshire* means a stable:) the fourth
(which they did not object to,) for entering, &c. a
dwelling-house; and *vi et armis* and with *strong hand*, &c.

They insisted that the offence charged in each of the
former three, respectively, was a *private injury*; and does
not at all concern the king or the public; and therefore
was not indictable. To prove this, they cited 2 Hawk.
P. C. c. 25, p. 210. And *Rex v. Thomlinson*, Tr. 9 G. 1.
for entering a close, was quashed.

The case of *Rex v. Bathurst*, they said, was, upon the [Sayer's Rep.
face of it, an indictment for a *forcible entry*, and *not* 27.
for a *common* trespass. It was a stronger case than this:
that was against *three* persons, who were enough to make
a riot: *this* is only against a *single* person: *that* was for
entering a *dwelling-house*, and putting him out of possession:
this is only entering a yard, digging the soil, and
erecting a shed. 8 Durn. 358.]

There are many cases prior to that of *Rex v. Bathurst*:
Hil. 11 G. 2, Rex v. Archer; Pas. 22 G. 2. Rex v. Gask;
Rex v. Hide, and *Rex v. Hide and another*, Tr. 22 and
23 G. 2.*

The converting an action of trespass into an indictment
is attended with great inconvenience: it makes the plain-
tiff a *witness for himself*, and *saves costs*.

Mr. Attorney General, in reply.—Let them *demur*
that the point may be settled.

The case of *Rex v. Bathurst* must govern the present
case. And in that case it is settled, " that *any* degree of
" force and violence sufficient to support an indictment
" may be given in evidence under the *vi et armis*:" which
contradicts the principle laid down by the other side. 22 and 23 G,
2. S. P. but
the rule was
enlarged.

Every battery, *every* breach of the peace is indictable.
The party injured has his *election* to bring an action, or
to indict. *Every* trespass too is indictable, if it comes
out upon the trial, to be an offence against the king and
the public.

1765.
 REX
 V.
 STORR.

Rex v. Bathurst, was only *vi et armis*: and *vi et armis* is, and was there holden to be, equipollent to “*with a strong hand*.”

*It is said, that in that case, there were three defendants; here, only one. But *one* man may commit a breach of the peace; though not a riot: he might be armed with *pistols*, for aught that appears to the contrary; and this might be, possibly, *proved*.

There is no distinction between a school-house, or even a dwelling-house, and a yard or a stable.

After that solemn resolution in the case of *Rex v. Bathurst*, an indictment of this sort ought not to be quashed in a summary manner, on *motion*.

LORD MANSFIELD—The objection to the fourth indictment is given up. The other three stand, all of them, upon the same ground. Nothing but the *vi et armis* implies *force*. *Every* force and violence is a breach of the peace.

The case of *Rex v. Bathurst* does not seem to me to lay down any such rule as “that *vi et armis* alone implies “such a force as will, of itself, support an indictment.” There, the fact itself naturally implied force; it was turning and keeping the man out of his dwelling-house; and done by *three* people. Three of the judges lay a stress upon that circumstance, of its being an entry into a *dwelling-house*: and the parties who framed the indictment plainly had a view to indict for a *forcible* entry.

As at present advised, I should think the present case within those that justify the quashing.

Coming with a *pistol*, though *possible*, is *not* to be supposed.

If there be no doubt upon it, there is no reason to put the defendant to more expence.

Mr. Justice WILMOT thought that it *ought to appear* to be an *indictable* offence: for otherwise, in cases where there was no malice, the defendant might be put to a great expence without remedy or satisfaction.

The cases cited shew, “that such indictments *have* “been quashed:” and that of *Rex v. Bathurst*, being an entry into a *dwelling-house* makes that case no authority in *this*.

[1702] But *this* case stands indifferent, “whether the offence “is indictable or not:” whereas it ought to *appear upon the face* of the indictment “that it is indictable.

Therefore he was for quashing these three indictments.

[8Dum. 358.] Mr. Justice YATES concurred. *Rex v. Bathurst* was determined upon a right principle: but *there*, the nature of the offence *appeared*; and evidence might be given to *shew* the offence to be indictable. It was a

forcible entry into a man's private dwelling-house, by three people.

1765,

REX
v.
STORM.

But in ordinary common cases laid *vi et armis*, we are not to suppose and presume swords and pistols, or any thing criminal and indictable, unless it be charged. Here is no outrage or violence charged or probable.

Therefore he was for quashing.

Mr. Justice ASTON likewise concurred. A man [8 Durn can not be indicted for a bare trespass. In a case of 359.] *Rex v. Jopson and five others*, P. 25 G. 2. B. R. All the [S. C. Sayer cases of this sort were cited: and the court refused to 27. 1 Wils. quash it on motion. The distinction there taken was, 355.] "that there were numbers of persons unlawfully assembled, and actual force charged;" and therefore that indictment was not quashed.*

* It was an indictment

against JOHN JOPSON and five others therein named, charging that they and several other persons to the jurors unknown, unlawfully assembled, to disturb the peace of the king; and, being so assembled, the six defendants particularly named, with force and arms, at &c. the mine of bleed lead of J. B. and J. S. Esquires, did unlawfully break and enter, and sixty pounds weight of black lead, &c. of the goods and chattels of the said J. B. and J. S. did unlawfully take and carry away; against the peace, &c.

Mr. Clayton moved to quash it; for that no indictment would lie; it being only a trespass for which an action of trespass or trover might and ought to have been brought; and he cited several instances where indictments had been very lately quashed, because the matter was merely actionable. Many of these have been already mentioned: others were *Rex v. Birkhead*, M. 11 G. 2. *Rex v. Newhall* (qu. when.) *Rex v. Archer*; *Rex v. Mason*; both in Hil. & Pas. 11 G. 2. (but both were without defence.) *Rex v. Jackson*, M. 12 G. 2. *Rex v. Heston et al.* Tr. 13 G. 2. quashed without defence.) *Rex v. Camage*, H. 14 G. 2. *Rex v. Coates*, H. 14 G. 2. and *Rex v. Bateman*, the same term.

THE COURT thought it to be such a sort of offence, that they ought not to quash the indictment upon motion: the defendants might demur, if they thought proper. And they were unanimous in discharging the rule.

In *Rex v. Bathurst*, the ruling reason was "that it was a dwelling-house:" and there would have been no occasion to have recourse to that reasoning, if *vi et armis* alone had been sufficient. The degree of force ought to appear upon the indictment.

If it was a matter of property, it ought to be civilly [1703] tried: as was done in a case of *Rex v. Wightwick*, temp. Lord Hardwicke. So in another, of *Rex v. Fry*—(tried by the name of *Fry* and *Wood*—) for pulling down a house at *Tunbridge-Wells*.

Therefore I think the three indictments which have been objected to, ought to be quashed.

LORD MANSFIELD—Let the three indictments be quashed;

And the rule be DISCHARGED, as to the other.

See S. P. determined accordingly, post p. 1706. *Rex v. Atkins*, the very next day after this; and *Rex v.*

1765. *Gillet*, on the same day; and *pa.* 1731. *Rex v. Bake and fifteen others*, on the last day of this term, 20th June 1765.

Tuesday, 11th June, 1765.

A tenant in tail may pass a base fee by lease and release, or bargain and sale, voidable by the issue in tail.

GOODRIGHT, *ex dimiss.* TYRRELL, wid. *versus* MEAD and SHILSON.

THIS was a special case in ejectment, from the last *Lent* assizes for the county of *Devon*. It was tried before Mr. Serjeant *Burland*: and a verdict was found for the plaintiff, subject to the opinion of this court, on the following case.

CASE—*John Shilson*, the father of the defendant *Nicholas Shilson*, being seised to him and the *heirs male of his body*, of the premises in question, the remainder to *his own right heirs*, by lease and release dated 24th and 25th October 1742, previous to his marriage with *Susannah Smerdon*, conveyed the same to trustees, to the use of himself for life; remainder, to the trustees to preserve contingent remainders; remainder, to the use of the said *Susannah*, for her life: remainder to his first and other sons by the said *Susannah*, in tail male.

The marriage took effect; and they had issue *Nicholas Shilson* the defendant their only son.

In Trinity Term 1761, the said *John Shilson* suffered a common recovery: and by deed dated 24th June 1761, he declared the uses of the said recovery to be to—*Lucas* his heirs and assigns; in trust to sell the said premises, and out of the money arising therefrom to pay and discharge certain debts mentioned in the said deed: and to pay the residue of the purchase money, or reconvey such parts of the premises as should remain unsold, to the said *John Shilson* his heirs or assigns.

The said — *Lucas*, by lease and release dated 27th and 28th October 1763, in pursuance of the trusts of the said deed last mentioned, conveyed the said premises to *Elizabeth Tyrrell*, the lessor of the plaintiff, and her heirs.

The said *John* and *Susannah Shilson* are both dead.

The question is, “whether, upon the facts stated, the plaintiff is intitled to recover the said premises.”

Mr. *Gould*, for the lessor of the plaintiff, insisted that the purchaser took a good title under this recovery.

1st. The law does not suffer an estate limited by a tenant in tail, to commence after his death, to take effect.

2dly. The limitations under the settlement in 1742, are ineffectual, wrongful and void.

[See Pigot, 120, 121, 122, 155. 3 Atk. 633. 7 Durn. 278. 8 Durn. 214.]

[1704]

3dly. If the uses are void in their creation, they cannot be made good by the common recovery.

First—In proof of the first position, he cited *Cro. Jac. and Lane*; and *Cro. Eliz.* 279, *Blitheman v. Blitheman*; and *Moore* 683, *Freshwater v. Rois*; and *Yelverton* 51. S. C.

Second point—It is not yet well settled, “what estate “the releasee or bargainee of a tenant in tail takes.” See 10 Co. 95. b. *Edward Seymour's* case.

But these limitations are wrongful and void, in point of form as well as in substance. The tenant in tail having taken back the estate to himself, he can do no more. All further uses are utterly void.

As to the manner of operation by uses—He cited *Yelv.* 51. *Freshwater v. Rois*, and *Cro. Eliz.* 279. *Blitheman v. Blitheman*: *Bro. Feoffments al. Uses* p. 20. and *Sheppard's Touchstone of Common Assurances* 509, which, he said, was in point to the present proposition.

Indeed there is a *dictum* in *Machil v. Clark*, which is contrary to this.* But it is not law: nor is it * v. 2 Salk. at all mentioned in several other reporters of the same 619. pl. 1. case.

He admitted that by the release, a defeasible estate passes to the releasee: but denied that the tenant in tail can limit to himself a use for life, to commence after this limitation. [1705]

The doctrine cited from *Sheppard's Touchstone* is in point: for the present case is a remainder; which lies in grant, as much as an *advowson* does.

Third point—If the uses are void in their creation, a common recovery cannot make them good: as appears by the case in *Cro. Eliz.* 895, *Beddingfield's* case and that of *Machil v. Clark*, before mentioned.

He concluded that the common recovery conveyed a good title to the purchaser.

Mr. Justice WILMOT.—It is now fully settled, “that a release or bargain and sale by a tenant in tail, “will convey a *base fee*, a *defeasible* estate, to the releasee or bargainee: though it must be allowed, that “the *old* notion was, and even in Lord Coke's time, that “a tenant in tail could *not* convey an estate *longer* than “for his own life.” But that notion is now over-ruled; and the contrary, settled.

Lord MANSFIELD—It is now settled, “that a “release or bargain and sale by a tenant in tail gives a “*base fee*, voidable by the issue in tail.” This is the principle of † *Machil v. Clark*: and many subsequent cases have been grounded upon it: particularly, that of *Stapilton v. Stapilton*. †

1765,
GOOD-
RIGHT
ex dimiss.
TYRREL
v.
MEAD and
SHILSON.

† v. Salk.
619. Comyns,
120.
S. C. 7 Mod.
1 Atkyns, 2.

1765.
GOOD-
RIGHT
ex dimiss.
TYRELL
v.
MEAD and
SHILSON.

Besides, the common recovery has made good this defeasible estate.

Either ground makes an end of this question. The recovery takes off the fetters of the statute *de donis*.

Mr. Justice WILMOT concurred. The tenant in tail had a fee originally: and a common recovery leaves him a fee again, by removing the bar and fetters imposed by the statute. When the bar and fetters are removed, it then becomes just the same case as if he had been tenant in [fee] *ab initio*. And though formerly it was doubted "whether a tenant in tail could, any other-
" wise than by a *feoffment*, grant any thing more than for
" his own life;" yet it is now settled, by the case of *Machil v. Clark*, "that he may, by bargain and sale, or by lease
" and release, pass a *base fee*." And if so, it is in his power to limit the remainder, as he pleases. And it makes no difference, whether it is limited to the use of the bargainee or the releasee, or to a *stranger*, or to *himself* for life with remainders over: for the base fee feeds all the uses that are limited upon it: *till* avoided by the entry of the issue in tail.

Qu. 10 Vin.
362. pl. 3.

Mr. Justice YATES—A lease and release, or a bargain and sale by the tenant in tail is *not absolutely void*; but conveys a *base fee, defeasible* by the entry of the issue in tail. This is now settled by the case of *Machil v. Clark*: and many determinations and conveyances are founded upon it.

Mr. Justice ASTON concurred.

The court were, therefore, unanimously of opinion, "that the recovery *enured* to the uses of
" the settlement, and that the plaintiff had *no title*."

JUDGMENT for the DEFENDANT.

Note—The court determined this case without hearing Mr. *Dunning*, the counsel for the defendant.

REX versus ATKINS.

No indictment
will lie for a
mere trespass.
V. ante,
p. 1698. S. P.

AN indictment was quashed: being the same point with the three which were quashed yesterday: (V. ante p. 1703.)

N. B. This was for pulling off the thatch of a man's dwelling-house; he being in peaceable possession of it.

Per Lord MANSFIELD and Mr. Justice ASTON—
This is within the distinction taken yesterday: it is only for pulling off the thatch.

REX *versus* GILLET.

1765.

THIS being an indictment like the 4th of yesterday, the same rule was made in this case, as in that: *V. ante, ut supra; and also the very last preceding case, S. P.*

That the rule for shewing cause why it should not be quashed, be DISCHARGED.

V. post, pa. 1731, Rex v. Bake and fifteen others, on the last day of this term. S. P.

SALVADOR *versus* HOPKINS.

Wednes. 19th June, 1765.

HEATON *versus* RUCKER.

THE question at present debated was, "whether there should be new trials in these two particular actions "upon a *policy of insurance*;" which had been tried before Lord Mansfield, at Guildhall; where a verdict was found for the plaintiff, in Mr. Salvador's case: and for the defendant, in Mr. Rucker's case.

But there were *nine* clauses, in all, upon the several insurances of this same *East-India* ship the WINCHELSEA, (Captain Hare, commander;) which were tried by special juries, at different times.

The charter-party, bearing date the, 20th of August 1761, was according to a *prin'ed* form, which has long been in use: in which, amongst many other provisions, there are the following.

"And to the end the said ship's *detention and stay* in "India and her demorage for the same, if any shall happen, during her present intended voyage, may be *ascertained*, it is covenanted and agreed by and between the parties to these presents, that in case the said ship shall, within eight months after the delivery of the said ship's last dispatches from *England*, arrive at her first consigned port in the *East Indies, China, Mocha*, or elsewhere within the limits granted or allowed to the said company; and notice be given thereof, in writing, of her arrival, to the said company's president, agent, or chief factor there: the said company will in such case, in four calendar months afterwards, or on or before the eleventh day of *February* which shall be in the year of our Lord 1763, or at farthest so soon after as the said ship, making all reasonable attempts, may get about the *Cape of Good Hope* so as to gain her passage home the same season, lade or cause to be laden on board the said ship, at some ports or places in the said *East Indies, China, or elsewhere* within the said limits, for *England*, so much goods and merchandizes (including therein the said tons of iron kintlage) as the said ship can conveniently

East India insurances includes the chance of detention in India, and the risque of the country voyage there.

[1708]

1765. " stow and carry in her, in manner as aforesaid, as shall
 SALVADOR " amount in the whole and together to the quantity of
 V. " 484 tons; but in default of loading the said ship
 HOPKINS. " within the space of four calendar months after such
 " arrival and notice given as aforesaid, the said ship
 " shall from henceforth enter into demorage of 20l. 3s.
 " 4d. a day for so long a time as she shall be *detained* in
 " *India, China*, or elsewhere within the said limits, in
 " the service and employment of the said company.
 " And furthermore, if the said ship shall, within the said
 " eight months after she shall be dispatched from
 " *England* as aforesaid, arrive at such port or place to
 " which she shall be consigned, and give such notice as
 " aforesaid; and yet is not dispatched for *England* with-
 " in the said four calendar months, or the said eleventh
 " day of *February*, or so soon after that the said ship
 " (making all reasonable attempts) may get about the
 " *Cape of Good Hope* so as to gain her passage home
 " the same season; NOR DETAINED by virtue of the next
 " ensuing or following proviso or covenant; then the said
 " united company or their assigns shall allow or pay unto
 " the said part-owners and master four months demorage,
 " commencing from the said eleventh day of *February*,
 " after the rate of 20l. 3s. 4d. a day, for and in consider-
 " ation of the passage so lost, and her stay in *India* after
 " the said eleventh day of *February*: but in such case,
 " no other demorage shall be paid in respect of the said
 " ship's stay after the said eleventh day of *February*.
 " And contrariwise, if the said ship shall not arrive at
 " her first consigned port within the space of eight
 " months after such dispatches delivered as aforesaid,
 " that then the said company shall load the said ship as
 " aforesaid, within four months after such her arrival,
 " and such notice given thereof as aforesaid; or, in de-
 " fault thereof, the said ship shall enter into the demor-
 " age of 20l. 3s. 4d. a day, immediately after the expira-
 " tion of the said last mentioned four calendar months,
 " for and during such time as she shall be *detained* by
 " the said company's presidents or factors, in the service
 " and employment of the said company, within the
 " limits aforesaid; but then the said ship shall not have
 " any further or greater allowance, though she be not dis-
 " patched so soon as to save her passage that season,
 " [1709] " than four months demorage only in consideration of
 " the passage so lost, and her stay in *India* or elsewhere
 " abroad on that account; nor shall such four months
 " demorage, for the loss of such passage, be allowed, if
 " the said ship be by virtue of the said next ensuing pro-
 " viso or covenant detained in the said company's service,
 " or if she be dispatched within the said last mentioned

“ four months, unless it evidently be made appear, to the
 “ satisfaction of the court of directors for the time being
 “ of the said united company, that the said ship was
 “ hindered from her arrival in time at her first consigned
 “ port, by unavoidable accidents only. PROVIDED always,
 “ and it is hereby covenanted and agreed; that the said
 “ company’s presidents, factors and agents *shall have liberty*
 “ *to detain the said ship*, after the said eleventh day
 “ of *February*, in their employment, in trade, and also in
 “ warfare; and shall have liberty to *let out the said ship*
 “ *to freight*, for the said company’s sole benefit, for so
 “ long time as they please: so as such detention be signi-
 “ fied in writing, and does not exceed twelve months
 “ from the said eleventh day of *February*, and so as the
 “ said ship be dispatched in the proper season to save
 “ her next year’s passage: in which case, the said com-
 “ pany shall pay demorage, for and during the term of
 “ her detention, after the aforementioned, rate of 20l. 3s.
 “ 4d. a day, till she shall afterwards be dispatched from
 “ her last lading port, or the expiration of the said twelve
 “ months, which shall first happen. But after the said
 “ twelve months are expired, the said ship may return
 “ for *England*; and the said company shall not be liable
 “ for any further demorage, or any damage that may ac-
 “ crue by her detention after that time: and in case all or
 “ any part of the said ship’s lading shall, after the expira-
 “ tion of the said twelve months, be wanting, yet the
 “ said company do agree, that the said ship may then
 “ return for *England*; the master having first made legal
 “ demand, thirty days before his coming away, and due
 “ protest for want of the said lading. And furthermore
 “ it is agreed, that if the said ship shall arrive at her con-
 “ signed port within eight months after delivery of the
 “ said ship’s dispatches as aforesaid, and shall not on
 “ or before the said eleventh day of *February* 1763 be
 “ dispatched for *England* as aforesaid, then the said united
 “ company, their presidents, agents, factors, or assigns,
 “ shall, over and above the value of the said 490l.
 “ sterling beforementioned to be allowed to be carried
 “ out, supply unto the master of the said ship for the
 “ time being, so many pagothas, rupees, or pieces of
 “ eight, dollars, or other coins, as need shall require, for
 “ buying victuals or other necessary provisions for the
 “ said ship, not exceeding the value of three hundred
 “ dollars for every one hundred tons the said ship is let
 “ for: valuing the money so supplied, at six shillings
 “ and sixpence a piece of eight or dollar in time of peace,
 “ and seven shillings and sixpence in time of war: and
 “ in the same proportion, for pagothas, rupees, and other

1763.
 SALVADOR
 V.
 HOPKINS.
 HEATON
 V.
 RUCKER.

[1710]

1765.
SALVADOR
V.
HOPKINS.
HEATON
V.
RUCKER.

“ coins. *And in case* the said ship shall not be dispatch-
 “ ed by the said company’s presidents, agents, or chiefs
 “ in council aforesaid, on or before the eleventh day of
 “ *February* 1764, then the said persons who shall so
 “ *keep the said ship*, shall, over and above the said sums of
 “ money beforementioned, furnish and lend the master,
 “ or the master for the time being, if he desires it, so
 “ many pagothas or rupees more, not exceeding the value
 “ of 300l. sterling for every hundred tons the said ship
 “ is let for, as, upon a survey to be taken as before di-
 “ rected, shall appear necessary to enable the said ship
 “ to proceed for *England*; so as the whole of the money
 “ so furnished be actually laid out in necessities for the
 “ said ship; valuing each of the said pagothas at nine
 “ shillings, and each of the said rupees at two shillings
 “ and sixpence: both which monies so supplied, with
 “ the advance of 40l. for every 100l. on the last men-
 “ tioned supply of pagothas and rupees, for and in con-
 “ sideration of the risque of the said ship’s return for
 “ *England*, shall be paid or (at the company’s choice)
 “ allowed them out of the freight and demorage pay-
 “ able by virtue of these presents. And if the said
 “ ship shall, by written orders from the said company,
 “ be detained at *Saint Helena* or any other port,
 “ to stay for convoy, in such case the said company
 “ shall allow the said part-owners and masters two-third
 “ parts of the demorage a day before agreed on, for every
 “ day she shall be so detained: but no allowance shall
 “ be made to the said part-owners or master on account
 “ of the said ship’s keeping company with any other of
 “ the company’s returning ships. But the said company
 “ shall not allow or pay any demorage for the time that
 “ the said ship shall take up in amending any defects:
 “ and further, if by the time taken up in repairing any
 “ defects in the said ship, she should exceed the times
 “ respectively limited for her stay in the *East Indies*,
 “ *China*, or other the limits aforesaid, or should thereby
 “ happen to lose her passage for *England*, the said com-
 “ pany shall in such case pay no demorage for such
 “ time so lost by repairing or amending any such de-
 “ fects, or for the passage lost thereby; EXCEPT and
 “ PROVIDED nevertheless, and it is hereby agreed, that
 “ if the said ship be detained in the company’s service lon-
 “ ger than the said eleventh day of *February* which shall
 “ be in the year 1764, and by reason thereof shall have
 “ need of being repaired, that then the said company
 “ shall pay or allow demorage after the rate aforesaid, for
 “ every day the said ship shall be so repairing, so as the
 “ same do not exceed thirty days.”

The dates of the facts were as follows—

1702. *March 25th.* The ship sailed.
Sept. 19th. She arrived at *Bombay*.
Novr. 4th. She left *Bombay* the first time.
1703. *March 5th.* She arrived at *Calcutta*, in *Bengal*.
28th. The presidency and council of *Bengal* entered into a new agreement with the captain: reciting “ that the charter-party would expire on the 11th *February* 1704, but that the president and council, finding it expedient to “ *detain* the ship in *India*, and desirous of having the time limited in “ the charter-party *prolonged*, &c.”—The indenture therefore witnesseth, that the captain lets the ship to freight, for *one whole year* from the said 11th of *February* 1704, &c.
July The ship arrived at *Bombay*, a second time.
Dec. 11th. She left *Bombay*, to go to *Bengal*.
1704. She arrived at *Bengal*.
March 19th. The ship left *Bengal* to go to *Bombay*.
21st. The ship was lost.
April 3d. Mr. *Hume* received a letter from the captain, dated 14th *April* 1703, inclosing a copy of the new agreement: which letter was publicly read in a coffee-house.
April 4th. Some insurances were made by Mr. *Hume*.
July 17th. Other insurances were made by Mr. *Hume*, all the other insurances were made, after the captain’s letter of 14th *April* 1703 was received, and publicly read in a coffee-house.
October 9th. An account was received in *London*, of the ship’s loss. All the policies had this description—“ At and from “ *Bengal*, to any ports or places where “ and whatsoever in the *East-Indies*, “ *China*, *Persia*, or elsewhere beyond “ the *Cape of Good Hope*, forwards “ and backwards and during her stay “ at each place, until her arrival at “ *London*; on money advanced or to “ be advanced for bills drawn by the “ captain for the use of the ship *Winchelsea*, and for account of the owner : and upon money advanced or to

1765.

SALVADOR
V.
HOPKINS.
HEATON
V.
RUCKER.

[1712]

1765.
SALVADOR
V.
HOPKINS.
HEATON
V.
RUCKER.

" be advanced as absence-money, to
" pay the ship's company; all or
" either, as interest shall appear: at
" 4 per cent."

"The underwriters insisted, that the *policies* were void, because at the time of underwriting, they were not expressly told of the new agreement "to detain the ship in India for a year longer than the enlarged time provided for by the charter-party, which expired on the 11th of February 1764."

The causes were at first tried with different success: but all the nine verdicts were at last uniform, for the plaintiffs, the insured against the underwriters.

The reasons which governed the court on granting or refusing new trials were---That the underwriters are bound and presumed to know the course of the East-India trade, the terms of the charter-party, and the destination of the India ships (which are under the direction of the company, and not of their owners:)--That the charter-party is a printed form, of a very long standing---That, besides the liberty thereby given, "to prolong the ship's stay for one year," it is very common, by a new agreement, to detain her a year longer; (for, no ship comes home in ballast;) and the longer a ship is kept, the more beneficial it is to the owners.---That the words of the policy are adapted to this usage; being without limitation of time or place; and without any reference to the first voyage particularly mentioned in the charter-party.---The terms of the policy precisely describe the risque, in it's utmost latitude; and necessarily extend to every prolongation of stay, and every country-voyage.---That any of the defendants might have learned at the India House all that was to be known.

[1713]

No mention was made, or question asked, at the time of underwriting, "when the ship was chartered;" "when she sailed from England;" "when she arrived in India;" "whether she was continued a year, according to the proviso in the printed charter-party;" and yet her continuance in the East Indies depended on all these facts.

If they ought necessarily to be disclosed, the policy was void, to the knowledge of the underwriters, at the time they took the premium.

The chance of her stay is one of the risques insured.

The evidence in all the causes was very strong, "that her staying a year longer, if known, would not have varied the premium."

This ship was insured at the same premium, after the prolongation of her stay in India was known.

None of the defendants desired to be off, after they knew that an account of the new agreement "to prolong

"her stay for a year longer" had been *received in England* upon the 3d of *April* 1764: which was *notorious to them ALL*, before the intelligence of her *loss*, which came in the *October* following.

So that *if* there had been any force to the objection, it would have been *waved* by the *acquiescence* of the under-writers, *after* they were *fully apprized* of the whole.

The *nine* causes were *these*: 1st. *Heaton v. Rucker*; 2d. *Salvador v. Hopkins*; 3d. *Hume v. Jebb*; 4th. *Hume v. Tidswell*; 5th. *Black v. Boehm*; 6th. *Black v. Innys*; 7th. *Hume v. Da Costa*; 8th. *Black v. Bond*; 9th. *Hume v. Boehm*. No. 1. was tried, the first time, on 26th *February* 1765; and a verdict found for the *defendant*; it was tried, a second time, on 10th *July* 1765; and a verdict found for the *plaintiff*. No. 2. was tried on 26th *February* 1765: and a verdict was found for the *plaintiff*. No. 3. was on 28th *February* 1765: and a verdict found for the *plaintiff*; the defendants not making any defence. No. 4. 5. and 6. were verdicts for the *plaintiff*, without defence, given at the same time with No. 3. No. 7. was tried on 1st *March* 1766: and a verdict for the *plaintiff*. No. 8. was on 4th *July* 1766: and a verdict for the *plaintiff*. No. 9. (*Hume v. Boehm*) was tried on 4th *July* 1766: a verdict was found for the *defendant*; and a *new trial* moved for on *Friday* the 7th, and granted on *Monday* the 21th of *November* 1766. It was accordingly tried a second time, upon the 5th of *May* 1767: and the jury have found a verdict for the *plaintiff*, without going from the bar.

As these causes are very much blended together in their nature and circumstances, I take the matter up here (though *anticipated* in point of *time*;) and include the *whole* of the motions for new trials in all these causes, in one single report. Perhaps the best method of rendering the whole matter clear and intelligible, would have been, to have begun with *Lord Mansfield's* report in this last cause of *Hume v. Boehm*; which gave the exact history of all the rest, and particularized the evidence: but the great length of such a report might have been objected to.

THESE two causes of *Salvador v. Hopkins*, and *Heaton v. Rucker*, being so very nearly connected with each other, were taken up together, and argued jointly, as if they had been but one single cause.

On *Friday* 17th of *May* last, they were argued by Mr. *Morton*, Mr. *Core*, Mr. *Walker*, Mr. *Dunning*, and Mr. *Heaton*, on behalf of the plaintiffs; and by Sir *Fletcher Norton* (Attorney General,) for the respective defendants, in both causes.

The COURT took time to advise.

LORD MANSFIELD now delivered the unanimous opinion of the court, "that there ought to be a *new trial*

1765.

SALVADOR
v.

HOPKINS.

HEATON

v.

RUCKER.

[1714]

1765.
SALVADOR
V.
HOPKINS.
HEATON
V.
RUCKER.

" in the case of *Heaton v. Rucker*; but not in that of *Salvador* against *Hopkins*."

They thought the usage of the *East India Company's* trade and the course of their voyages, to be in fact sonotorious, and so well known both to the insurers and the insured, that they must be supposed fully apprized and sufficiently conversant of it; and that the obligation of this policy is to be taken, from the words of the charter-party, (which refer to the usage,) and the usage of these voyages, in the same manner as if it was expressly inserted in the policy.

His lordship entered into the reasons of their determination in these two causes with more particularity than may be necessary here to specify; as I have already mentioned those which seemed to govern their general determination in all the nine causes.

[1715]

THE COURT esteemed this to be the most convenient way of determining this question; because whoever shall hereafter insure on an *East India* ship, will know that he insures the contingencies; and may take proper precaution against them, if he will: whereas if every person insured should be obliged to open to the insurer all the grounds of his expectations about the ship's continuance in the *East Indies*, or coming to *England*, it might produce great litigation and confusion in cases arising upon these *East India* policies.

The RULES then made were,—That in *Salvador v. Hopkins*, there should be

No new trial:

But in *Heaton v. Rucker*,—There should be

A new trial.

THE CAUSE of *Hume v. Boehm* was not tried till long after this determination in these two causes*: and the verdict being for the defendant, Mr. *Morton* moved, upon the 7th of November 1766, on behalf of the plaintiff, for a new trial; the verdict being, as he alledged, contrary both to law and evidence.

* V. ante,
p. 1713.

RULE to shew cause.

On Monday the 24th of November 1766, Sir *Fletcher Norton* shewed cause.

The great question was, "whether the circumstances of the case and the facts were sufficiently communicated to the underwriter, at the time of his underwriting the policy."

THE COURT thought they were.

[Ch. Pre. 25.
and see 1 Vez.
457.]

They held that the understanding of the policy must depend upon the course and usage of the *East India* trade; and conceived it to be contradictory to the policy, to say "that the underwriter did not underwrite for a country-voyage;" and were unanimous in making the rule absolute for a

NEW TRIAL.

This cause of *Hume v. Boehm* was tried the second time, upon the 5th of *May* 1767: and the jury found a verdict for the *plaintiff*, without going from the bar. 1765.

REX versus ROBERT HANN and JOHN PRICE, Justices of Peace for the Borough of Corfe-Castle.

[1716 ']
Thurs. 19th
June, 1765.

CAUSE was now shewn against an information which had been prayed against them, for a misdemeanor in the execution of their office, as justices of the peace for the said borough, in *refusing* to grant a *licence to sell ale*, to one *Ingram* an inn-keeper in that borough; MERELY *from a motive of* RESENTMENT against him, for having joined in an affidavit made in support of the interest which was adverse and opposite to that which was espoused by these two justices and their friends. Information against justices of the peace for acting from motives of resentment.

Their defence was, that they did not act from any resentment, or other corrupt motive; but solely because *Ingram* was an improper person, and had kept a disorderly house, and continued to keep it after full notice to the contrary; and in particular, that he encouraged gaming and cock-fighting, at his house.

LORD MANSFIELD—The court should never interpose against magistrates,* unless they have acted from bad motives and *malâ fide*; especially in such a case as this, where they are entrusted with an *absolute discretion*. But, for that very reason, this is the strongest case for the interposition of the court, if it appears that they have acted upon corrupt motives. * V. ante, 556 to 565. Rex v. Young and Pitts, Esqrs. [See also Doug. 568.]

If it appeared clearly, that this man did keep a disorderly house, it would be a reason against the court's interposing against the justices. But this does *not* clearly appear.

Upon the whole, he thought, and by a full discussion of the affidavits shewed why he thought the charge upon the justices was *not* satisfactorily answered by them: and he declared it to be of very dangerous consequence, to permit the due discretion of the justices to be influenced by considerations of this kind.

The court thought it a proper case for an information: and made the

RULE ABSOLUTE.

V. post, (pa. 1786.) 20th Nov. 1765.

1765.

Friday, 14th
June, 1765.
[S. C. Bull.

154.]
Lord of a
manor may
maintain an
an action for
the fine due
upon the ad-
mittance of an
infant copy-
holder when
he comes of
age.

EVELYN, Bart. Executor of SIR JOHN EVELYN, Bart.
versus CHICHESTER, Esq.

THIS was a special case from Surry assizes.

It was an *indebitatus assumpsit*, wherein the plaintiff declared as executor to his father, for 150l. assessed for a FINE for the admission of the defendant to a customary tenement called *Daniels*, within the *Manor of Abinger*, of which Sir J. E. the father was lord: which customary tenement consisted of a *large capital mansion-house* and a *small parcel of land*, which *land* was let for 7l. a year, subject to land-tax, quit-rents and other outgoings; but the *mansion-house* had been *unlet* from the time of the admission of the defendant to the time of the action brought: Mr. *Chichester's* agents not being able to let it, though it was advertised for that purpose.

On the trial, (a) it was proved, that Sir J. E. the father was lord of the manor. That on the presentment of the death of the defendant's father *John Chichester*, who died seised, three proclamations were made for the defendant to come in and be admitted. That on the 4th of *March* 1747, the defendant was admitted to the said customary tenement, in person; and the *guardianship* committed to Sir *Roger Newdigate* and *John Ludford*, esq. they rendering an account: and upon such admission, a fine was duly assessed, of 150l. payable on the 12th day of *April* then next following, at the mansion-house called *Abinger Court*; being the *like sum* as was assessed for a fine on the *last* admission of the defendant's father. That the defendant was, at the *time of his admission*, of the age of *six years* or thereabouts. That the said Sir J. E. the father lived about sixteen years after the said admission; and then died: and about two years *after* the defendant *came of age*, this action was brought against him by the plaintiff, as executor of his father, for the said fine; the defendant, his guardians, or their under-tenants having been *in possession* of the premises from the time of his admission to the time of commencing the action. The under-tenant had *paid the quit-rent* as it became due, (though he said he had *no direction* to do so,) up to the present time.

The jury being of opinion "that the fine was a reasonable one," found a verdict for the plaintiff, for 150l. but subject to the opinion of the court on the following question—

(a) See 1 Sider. 58. 3 Mod. 239. 1 Show. 35. 1 Lev. 273.
3 Lev. 261. 1 Durn. 618. 3 P. Wms. 151.

Question—"Whether *this* action will lie against the defendant; he being a MINOR, at the time of the fine being assessed."

1765.
EVELYN
V.
CHICHESTER.

Mr. Coxe, for the defendant, admitted "that *this* action of *indebitatus assumpsit* does lie by an executor, for a copyhold fine set by his testator," since the determination of the case of *Shuttleworth v. Garnett* reported in 3 *Leo.* 261. and 1 *Show.* 35. and 3 *Mod.* 239. and *Curthw.* 90. S. C. where three judges held, against *Holt*, "that an *assumpsit* would lie by an administratrix for a fine of a copyholder." But Mr. Coxe insisted, that it does not lie against a *minor*: it is not such an action as will lie against an infant. There is a case in point, "that an action of *debt* would not lie." 1 *Ld. Raym.* 36. *Borough's* case; "debt will not lie against an infant, for a copyhold fine upon his admission. And therefore an infant arrested upon such an action, being five years of age, was discharged."

And the infant has done nothing since he came of age, to ratify what was done before. Here is a large capital mansion-house, *unlet* at the time the action is brought; of which the defendant's guardians or under-tenants have been in possession; and the tenant has continued to *pay the quit-rent*, but *without his direction*. Now this could not be for the *benefit* of the infant.

The rent of the land is only 7l. Therefore a fine of 150l. is *unreasonable*. (b)

It is stated, that the infant was six years old, when he was admitted: and guardians were then appointed. It shall be intended that these guardians were appointed under the act of 9 G. 1. c. 29.

I do not say, that the lord is not intitled to a remedy: I only say that he is not intitled to *this* action of *indebitatus assumpsit*.

Mr. Bishop, *contra*—This is an action brought *after* the infant came of age. The case cited from Lord *Raymond* was an action brought *pending* the infancy.

The plaintiff has *no other remedy*. The statute of 9 G. 1. is not found by the jury.

This admission *was* for the *benefit* of the infant; for, if he had not been admitted, he could not have enjoyed the rents and profits. He took nothing, *till* his admission. (c) I agree, that neither debt nor *assumpsit* could [1719.]

(b) But there was a capital mansion-house, as well as land, as appears by the state of the case.

(c) This is a mistake, because his father died *seised*, as stated page 1717, and he took as heir by descent: had this been the case of a surrender, what is here said would have been true.

1765.
EVELYN
v.
CHICHES-
TER.

have been brought against the infant, *during* his infancy.

The act of parliament of 9 G. 1. c. 29. was made for the *mutual benefit* of lords and infant-tenants; it is intitled "An act to enable lords of manors more easily to recover their fines; and to exempt infants and femes covert from forfeitures of their copyhold estates, in particular cases." But there was no proceeding *under* this act, in the present case.

If Sir John Evelyn had *entered*, under this act, he must have been a *sufferer*; as it was a large old house, in a bad country, and untenanted.

The defendant has actually received the rents and profits of this estate for near twenty years. It has been, all this time, in the possession of "him, his guardians, or under-tenants;" which is *his* possession.

And the fine is stated to be a *reasonable* one.

LORD MANSFIELD—There is no giving an opinion upon this case, seriously.

Here is a *reasonable fine* assessed, the *same* as his father paid; an *enjoyment for sixteen years*, and part of it, *since* he came of age; and *no renunciation* of the estate—; on the contrary, a confirmation of the transaction.

Mr. Justice WILMOT—An *entire* confirmation. I have not the least *scintilla* of doubt.

Mr. Justice YATES—If the defendant was *still* an infant, I should think *this* action *maintainable*. Debt, perhaps, would not lie, because an infant cannot wage his law. (*d*) But *assumpsit*, I think, would lie; as the infant continued to occupy and enjoy the estate.

In 2 Bulstr. 69. *Kirton v. Elliott*—The plaintiff recovered against an infant the rent upon a lease made to him; and it is there said—"If a lease be made to an infant, and he *occupies and enjoys*, he shall be *charged* with the rent."

[1720] An infant may contract for necessaries. He could not have *received* the rents and profits of this copyhold,

(*d*) In debt for rent upon a lease for years the defendant shall not wage his law, *Co. Lit.* 295. a. S. P. though the rent be reserved on a *parol* lease: because it is in the realty, and arises from the taking of the profits from the land, and occupation of it in the country; and so the *notoriety* of the thing excludes the defendant from waging his law. *Per Holt*, Ch. J. 12 Mod. 681. *Qu.* therefore, if the infant could in this case have waged his law; but yet, in debt for a fine or amercement at a court baron, the defendant may wage his law. *Co. Lit.* 295.

without admittance; and he must previously pay the fine for such admittance. But here, he has *affirmed* the whole transaction; he has *enjoyed* two years, *since* he came of age.

1765.

Mr. Justice ASTON was of the same opinion.

Per Cur.—unanimously,

The *postea* must be delivered to the PLAINTIFF.

REX *versus* MIDLAM;

IDEM *versus* EUNDEM.

SIR Fletcher Norton, on behalf of the prosecutor, shewed cause against a rule which had been made upon him, to shew cause “why I should not be directed by the court, to *forbear*, and *not to proceed* to tax the prosecutor his costs in these causes, relative to the affirmation of the convictions against the defendant in these causes;” and also “why the *bond* entered into by or on the behalf of the defendant, on allowing the *certiorari*, should not be delivered up to the said defendant or his clerk in court to be cancelled.”

Where a *certiorari* to remove a conviction is issued out of necessity, on the prosecutor's refusal to give a copy, such prosecutor is not entitled to costs.

This *certiorari* was brought for removing a conviction upon the *game-laws*; and the present rule was grounded on an affidavit of hardship and oppression upon the defendant; namely, that although the defendant had paid the forfeiture upon the conviction, yet an *action* had been brought against him for the *same* offence; and when he wanted to plead this conviction in bar of the action, the justice had *refused* to give him a *copy* of it: and he was *obliged* to remove it by *certiorari*: and the prosecutor set it down in the paper, and got it affirmed; and then the prosecutor became nonsuited in the action.

Sir Fletcher, on behalf of the prosecutor, insisted on having his costs.

He urged, that the act of 5 Ann. c. 14. § 2 directs full costs to be paid upon removing these convictions, in case the conviction be affirmed. And this is *general*; and they must be paid in *all* cases where the conviction is affirmed; be the *certiorari* brought “upon *any* pretence whatsoever;” (for, so the act of parliament is expressly worded.) And this conviction was affirmed. Therefore the court *cannot*, upon this man's *own affidavit*, enter into the *cause* or *occasion* of the removal of the conviction by this *certiorari*.

[1721]

Mr. Whetler and Mr. Walker, *contra*. The removal of the conviction was absolutely necessary here; in order to

17(5).
 REX
 V.
 MIDLAM.

its being *pleaded* to an action brought for the *same* offence, under the 8 G. 2. c. 19. § 2. So that this was not an *adverse* proceeding: nor was the *certiorari* brought for *vexation*, but from *necessity*.

The case of *Rex v. the Inhabitants of Madley*, in 2 Sir J. S. 1198. is not unlike the present. The order was affirmed as to the father and mother, but quashed as to the daughter. It was resolved; that the parish who removed the order should not pay any costs; otherwise, where a *certiorari* is brought *unnecessarily*, and consequently *vexatiously*; which, the court there said, was the *true test* to go by.

Now the present case falls within that true test: the removal was *not* unnecessary; and consequently, *not* vexatious.

This defendant had paid the penalty: and then the prosecutor brought an *action* for the *same* offence. The conviction was, therefore, *necessarily* to be removed: it was not removed upon a *frivolous* or *vexatious* cause. The whole effect of it was over: the penalty had been actually paid. The action brought for the same offence was mere oppression: the *vexation* was exercised upon the defendant, *not by* him.

Sir *Fletcher Norton* said, the defendant might have quashed the conviction if it was bad: and the penalty must have been refunded.

[1 Hen. Bl.
 531.]

Lord MANSFIELD—This is *not* a case within the *intention* of the act of parliament of 5 Ann. c. 14. § 2. For, *this certiorari* was *not* brought for vexation, or out of obstinacy or perverseness; nor to *over-hale* or *object* to the conviction: but an action being brought for the same offence, the defendant in that action could not obtain (though he ought to have had it) a *copy* of the conviction from the justice of peace who made the conviction: and therefore he was *obliged* to bring a *certiorari*, to remove it; and he removed it for *that* purpose *only*. The prosecutor had no occasion, therefore, to be at *any expence* about it; for, the defendant [1722] did not object to it. But the *prosecutor* set it down in the paper, only to increase expence, and merely for vexation; supposing “that the *defendant* would have “been obliged to pay for it.” The plaintiff in the action was nonsuited: and I think the *defendant* (instead of *paying* costs) ought to have had an *allowance* of the costs he was put to in removing the conviction; as it was a *necessary part* of his defence.

Therefore the present rule ought undoubtedly to be made absolute.

Mr. Justice WILMOT—This is one of the many cases where poachers are pursued with *unintermitting*

vengeance. Here was not only *that*; but gross oppression also. He was extremely clear, that this was not a case within the intention of the second section of the 5 Ann. c. 14. And he thought (as Lord Mansfield also did) that the justice ought to have given the defendant a copy of the conviction, without putting him to the trouble and expence of bringing a *certiorari* to remove it. The bringing the action for the same offence was, a gross oppression: and the plaintiff in it was nonsuited. And though he knew that the *certiorari* was brought only from necessity; (as the justice had refused to give the defendant a copy of it;) and that the defendant had actually pleaded it, and used it as a good one;—*what*, but oppression, could induce the prosecutor to set it down, and get it affirmed? He had had the effect of it: the penalty had been paid.

1765.
REX
V.
MIDLAM.

Therefore he concurred with Lord Mansfield, that the rule ought to be made absolute.

Mr. Justice YATES also concurred, for the same reasons

The justice ought to have given the defendant a copy of the conviction: for it was a record: and the defendant was intitled to it. And he ought to have been allowed the expence of his necessarily bringing a *certiorari*, in costs upon the nonsuit; for it was necessary to his defence in the action. He did not remove the conviction, in order to object to it: on the contrary, he had submitted to it, and had paid the penalty. He removed it out of necessity: it was necessary to his defence in the action.

He thought this proceeding of the prosecutor to have been a very oppressive one, in every stage of it; and that the bringing the *certiorari*, under the circumstances of the present case, did not intitle the prosecutor to his costs upon affirmation of the conviction: and therefore this rule ought to be made absolute,

[1723]

Mr. Justice ASTON was clearly of the same opinion.

Per Cur.

RULE MADE ABSOLUTE:

And the prosecutor to pay the costs out of pocket, of this application.

MILLAR versus YERRAWAY.

Saturday, 15th
June 1765.

MR. Bearcroft, on behalf of the defendant in error, shewed cause against a rule which had been obtained by the plaintiff in error, for the defendant in error to shew cause “ why the writ of *scire facias*, on “ which the defendant in the original action (the present

Sci. fa. in error needs not lie four days in the office before return.

1724

Trinity Term, 5 Geo. 3.

1765.

MILLAR

v.

YEHRA

WAY.

"*plaintiff in error*) had been summoned, should not be set aside for irregularity."

Mr. Walker (who obtained the rule) had objected on behalf of the plaintiff in error, "that this writ of *scire facias* had not lain four days in the office, before its return."

But THE COURT took a distinction between writs of *scire facias in error*, and writs of *scire facias against bail*:
 *V post. 2439. 5th June 1769, It is not necessary, in the former case, "that the *scire facias* should lie in the office before the return;" though it is necessary, in the latter. And the rules that have been made for the *scire facias* lying four days in the office, relate (as Mr. Justice Yates observed) only to writs of *scire facias against bail*.

Gross v. Nash
acc.

Therefore they DISCHARGED the RULE.

Monday, 17th
June, 1765.

GREETHAM, Widow, *versus* the Inhabitants of the Hundred of THEALE.

Wherever a plaintiff is entitled to costs, so on the other hand is the defendant also.

THIS was an action brought by the party grieved, against the *inhabitants*, on 9 G. 1. c. 22. § 7. for satisfaction and amends for the damages sustained by the maliciously setting on fire a barn and outhouse belonging to the plaintiff: in which action, the plaintiff was nonsuited; and on an application by the defendants to the master, "to tax the costs of the nonsuit," he doubted "whether the *defendants* were intitled to them."

[1724]

Whereupon Mr. Ashhurst, on behalf of the defendants, now moved for the direction of the court, to the master, "to tax them."

He mentioned the statute of 18 Eliz. c. 5. made for the restraint of informers upon penal statutes; by the 3d section of which, an informer upon a penal statute shall pay costs, if nonsuited. And he urged and relied upon that of 4 Jac. 1. c. 3. § 2. "that if any person sues, in any court, any action wherein the plaintiff or demandant might have costs, if judgment should be given for him; the defendant shall have judgment to recover costs against such plaintiff or demandant, if he be nonsuited, or a verdict pass against him." And he cited the case of *Bellasis v. Burbriche*, in 1 Ld. Raymond, 172. to prove "that where an action upon a penal law is brought by the party grieved, he shall have his costs." And as this action is brought by the party grieved, who would have received costs, if he had prevailed; it is clear, that he must pay costs, upon being nonsuited.

[Buller, 331.]

1 Hen. Bl. 11.]

1 Durn. 70.]

Cowp. 367.]

6 Durn. 357.]

Mr. Stowe, on behalf of the plaintiff, opposed this motion. He admitted, that where the party grieved sued as being so, he should have his costs; but a common informer, he said, shall not have his costs, though he be the

party grieved. But the *defendant* shall have no costs, 1765.
even where the action is brought by the party grieved. GREETHAM

And he cited the following note, out of 1 *Salk.* 30.
" Note, Where a statute gives a penalty to a stranger, *Inhabitants*
" and he sues, he is a common informer, and shall pay *v.*
" costs upon the 18 *Eliz.* But where the statute gives *of NEALE.*
" it to the party grieved, he is not a common informer,
" nor liable to pay costs within the 18 *Eliz.* 1 *Anderson,*
" 116. 3 *Cro.* 177."

Mr. *Ashhurst*, in reply. Perhaps, we may not be in-
titled to costs under the 23 *H. 8. c. 15.** But we certain- * *v. § 1.*
ly are, under 4 *J. 1. c. 3.*

THE COURT held, that *wherever* the plaintiff
would be intitled to costs, the defendant is so, *recipro-*
cally. (a) Here, the plaintiff, the party grieved, *would*
have been † intitled; therefore as it is mutual and reci- † Qu. of this
procal, he is liable. And accordingly they gave direc- assertion
tions to the master " that he
" would have
" been intitled
" to costs."

TO TAX THE COSTS.

See what was said by Mr. Justice Aston, in the case of *Wilkinson,* qui tam, &c.
v. Alliott, clerk, 27th Nov. 1775, B. R.

REX *versus* INHABITANTS OF UTTOKETER.

[1725]

See this case at large, in my SETTLEMENT-CASES, No.
172. P. 538, and abridged, in the TABLE to this
volume.

WESTON *versus* MASON.

WESTON *versus* CHAPMAN.

Thurs. 20th
June, 1765.

ON Monday the 10th instant Mr. *Dunning*, on behalf
of the defendants, moved in arrest of judgment; a
verdict having been found for the plaintiff. Matter of de-
murrer will
not be listen-
ed to after
verdict.

It was an action of debt on bond, brought against the
sureties of a sheriff's bailiff. Oyer was prayed of its con-
dition. The condition recites, " that the sheriff has ap-
" pointed this person a bailiff for the hundred of *East*
" *Goteau:*" if therefore he shall duly execute his office,
&c. WITHIN that hundred; and shall duly execute all war-
rants directed to him, and make due and sufficient return
thereof, &c. then the bond to be void. Performance of
the condition was pleaded. To which plea the plaintiff
replied, and assigned a particular breach. The breach
assigned by the plaintiff was, " that this bailiff had not

(a) This is by the express words of 4 *Jas.* 1. c. 3.

1765.
WESTON
v.
MASON,
and
v.
CHAPMAN.

"made a due return to a particular warrant directed to him." The defendant rejoins "that he had." Mr. *Dunning's* objection was, "that this man is only appointed bailiff of a *particular* hundred; and the warrants to which he was *obliged* to make returns are *commanded* to the particular hundred of which he was bailiff: and it does not appear, that the warrant which he is charged not to have returned, was directed to him as bailiff of the hundred. And *if not*, he was not obliged to return it."

The case of *Stoughton v. Day*, Hil. 22 C. 2. in *Aleyn* 10, is in point: it is exactly the same case with the present, in all its circumstances; except that *that* was a warrant on an execution; *this*, on mesne process. And that case is cited and approved by Mr. Justice *Twisden*, in 2 *Saund.* 414. (in the case of Lord *Arlington* against *Merrick*.)

[1726] Sir *Fletcher Norton* and Mr. *Ashurst* now shewed cause why the judgment should not be arrested.

As to the objection, "that he was appointed bailiff for the hundred of *East Gotson* only"—This does not appear, otherwise than by the *recital* in the condition of the bond. Besides, the warrant was *directed to him*, and *delivered to him*: therefore he ought to have returned it.

These bailiffs are appointed bailiffs of a particular hundred, merely to prevent confusion in summoning juries, and *such like purposes*: but as to *executing mesne process*, they are *not* confined to the particular hundred; in *that* respect, they are bailiffs for the *whole county*. Otherwise, there must be as many warrants as there are hundreds in a county; which would be very inconvenient.

The court cannot make such an intendment, upon these pleadings. The defendant pleads this condition of the bond, and a performance of it. The plaintiff shews a breach, in not executing a particular warrant. The defendant rejoins "that the bailiff *did* execute it." Issue is joined thereon: and a verdict for the plaintiff.

The case cited from *Aleyn* proves only, "that as the defendant was *not obliged* to execute the writ there in question, he could not be charged for not executing it." But *here*, the defendant does not pretend "that he was *not obliged* to execute it." If he had pleaded that, it had been another thing. Here he is estopped from saying "that he was not bound to execute it:" for, he has *received* it. *That* case was on demurrer: *this*, after verdict. Therefore it shall be supposed, "that every thing necessary to maintain the action was *proved*."

The *practice* is, for sheriffs to direct these warrants,

generally; and not " to the bailiff of a particular hundred."

If this was a good objection, there would be an end of all sheriff's bonds.

They therefore prayed judgment upon their verdict.

Mr. *Dunning* and Mr. *Davenport*, *contra*, for the defendants, insisted upon the case cited from *Aleyn*, as being a case in point: the condition was in the very words of the present condition. There too, the bailiff *had executed* the writ, as well as here. And they alledged, that upon looking into the record of that case of *Stoughton v. Day*, it *agreed* with the present record. Moreover, that case has been recognized, in a case subsequent to it, *viz.* 2 *Saund.* 414. Lord *Arlington v. Merricke*.

They admitted, that the bailiff *might* execute a writ out of the hundred; but insisted that he was *not bound* to do it *under this obligation and condition*: and if he was not bound to *execute*, he was *not bound* to *return* it. But admitting even " that he himself having *undertaken* to do " it, was answerable for doing it regularly;" yet the present defendants are not answerable for his doing so. For these defendants are the *sureties* of the bailiff; *not* the bailiff *himself*. Therefore under this *general* direction of these warrants, *they* are not bound: for they have undertaken for no more than his behaviour *within this particular hundred*. The bailiff *himself* may perhaps be answerable for the regular executing this writ, having undertaken it: but the sureties are not; it is not within *their* undertaking.

As to the general principles of arresting judgments, they cited 1 *Salk.* 77. title " Arrest of Judgment." 1 *Bulstr.* 173. *Hob.* 301. and *Curthrew* 148.

As to the *verdict curing* the defect—The plaintiff *not* having *alleged*, it was *not necessary* for the plaintiff to *proce*, either " that the writ was directed to him *as* bailiff of the " hundred of *East Gorton*;" or, " that it was to be executed *within* that hundred."

LORD MANSFIELD—

The condition of this bond appearing upon oyer, the plea alledged a performance of it, by the bailiff's having duly executed, and made due and sufficient returns to *all* warrants directed to him. The plaintiff replies, and specifies a particular warrant which he did *not* duly return. The defendant does not demur; but *takes issue* upon the fact. It does not appear that this warrant was directed to him *as* bailiff of the hundred. Therefore it is said " that he was not obliged to execute " it:" and a case is cited out of *Aleyn*, as in point.

VOL. III.

G g

1765.

WESTON
V.

MASON
and

V.
CHAPMAN.

[1727]

1765.
WESTON
v.
DEASON.
and
v.
CHAPMAN.
[1728]

But the case out of *Aleyn** was upon a *demurrer*.

* N. B. This case of *Stoughton v. Day*, is also reported in *Style*, 18. And (though very erroneously there reported) it appears both from *Style*, and from *Aleyn*, that it was upon a *demurrer*.

If it stood upon the construction of the bond, I should have desired to consider of it: but this being in arrest of judgment after a verdict, and not on *demurrer*; it does not appear, that it was not directed to him as bailiff of the hundred.

Mr. Justice WILMOT—If it had stood upon a *demurrer*, I should have thought the case in *Aleyn* to have been in point.

If it had stood upon the whole, and upon the construction of the bond, I should *rather* think (with Mr. Attorney) “that, in general, he had an authority, *as to execution process*, all over the county:” but I give *no* opinion, as to this.

But, upon *this record*, we can not take the warrant to be directed to him *otherwise than as* bailiff of the hundred. And by joining issue on the fact of returning it, he *admits* “that it was *not* directed to him *generally*.” And since, he has admitted the *execution* of it, we can not intend that it was *not* directed to him *as* bailiff of the hundred, in order to *arrest* a judgment.

Mr. Justice YATES—The case in *Aleyn* was determined on a *demurrer*; (a general *demurrer* indeed: but it was before the statute of Queen *Anne*.*) Therefore *that* case does not affect *this*.

* V. 4, 5 Ann.
c. 16. s. 1:
concerning
special de-
murrers.

A *verdict* will aid a title defectively set forth; though not a total defect of title.

But here, it was sufficient for the plaintiff to pursue the words of the condition of the bond: and it lay upon the *defendant* to shew “that this was *not* such a warrant “as was within the condition.” Whereas he admits, that the bailiff *returned* this warrant: which is an admission of its being a *proper* one. And the court will not *intend* it to be otherwise, in order to *overturn* a verdict.

I am therefore clear, that the plaintiff is intitled to his verdict. The defendant has not chosen to take the opportunity of shewing what he might have done, if true.

Therefore there is no ground for arresting the judgment.

Mr. Justice ASTON concurred; and joined likewise in observing that the defendant might have taken the proper method of stating the particular fact to his advantage, by a rejoinder, if his case would have born it; whereas he has *declined* that, and taken issue upon the fact *generally* assigned.

Per Cur.

Postea to be delivered to the PLAINTIFF,
in both causes.

[1729]

REX *versus* INHABITANTS OF WHITE CHURCH CANONICORUM.

1765.

See this case *abridged*, in the TABLE; and *at large* in the quarto-edition of my SETTLEMENT-CASES, No. 173. pa. 540.

BISSEX *versus* BISSEX.

Friday, 21st June, 1765.

THIS was an action of debt on a bond dated 28th *March* 1764, conditioned to perform an award to be made and delivered on or before the 21st *May* then next following. The defendant pleaded, "that the arbitrators did not make any award on or before 21st *May*." To this, the plaintiff replied, "that the arbitrators in the said condition mentioned, after the making of the said writing obligatory, and before the exhibiting of the bill of the plaintiff, *to wit*, on the 21st day of *May* in the said condition mentioned, did make their award; and therefore by ordered *Edward Bissex*, the defendant, to pay 56l. due to the plaintiff, on divers accounts, from *John Bissex* deceased, the defendant's father." The defendant demurred specially to this replication; and for cause shewed, 1st. That it does not shew that the said award was made and ready to be delivered to the parties *on or before the 21st day of May*; but the pretended time of making the said award is included under a *videlicet*, and not made or attempted to be made *part of the issue* in this cause. 2dly. That it was made concerning transactions supposed to have passed between the plaintiff, and *John Bissex* deceased; without shewing that such transactions were never submitted to arbitration by the bond. 3dly. That the replication was a mere negative pregnant, neither confessing or avoiding, traversing or denying the matter alledged by the plea.

The plaintiff joined in demurrer.

Mr. *Gould* for the defendant, argued that it does not appear that this award was made *within the limited time*. [1730] For the *time* of making it is not positively, directly and precisely alledged; but *only* comes under a *videlicet*: it is not alledged with sufficient certainty, for the defendant to have taken issue upon.

He cited the case of *Skinner v. Andrews* in 1 *Siderf.* 370; (a) and 2 *Keb.* 361, 368; and the *Bishop of Lincoln v.*

(a) The report of the case in 1 *Sid.* 370, is expressly so; and there is nothing to the contrary in any of the other reporters, i. e. not in 2 *Keb.* 361, 388, or 1 *Lev.* 245. And
G g 2

1765.

BISSEX

v.

BISSEX

† V. ante,
p. 1508. and
1509.‡ V. 2 Keble,
361, 388. and
1 Levinz. 245.* Lord Mans-
field was gone.

Wolforston, Trin. 4 Geo. 3. B. R. † to prove, that it was bad upon the special demurrer.

Mr. *Wallace*, for the plaintiff, likewise cited the same case of *Skinner v. Andrews*, from 1 *Saund.* 169: and said it was precisely the same case as the present.

The ‡ other reporters of *Skinner v. Andrews* all agree, "that it was positively enough alledged."

And the record shews that the award was dated on that day.

Mr. Justice *WILMOT**—The award was in fact made on the 21st day of *May*. The defendant says "no award was made." To this, the plaintiff replies, "that an award was made, after the making of the bond, and before the exhibiting of his bill, *to wit*, on the 21st day of *May*."

It seems to me to be a *positive* averment. I would have adhered to a case *directly in point*, even against my own common sense. But this case of *Skinner v. Andrews* is not so. It was upon a general demurrer. *Saunders* was the most accurate reporter of his time: and he says, "it was holden to be positively enough alledged." If any thing was thrown out by any of the judges, not founded on any argument, it was extrajudicial, and not to the point before them.

Mr. Justice *YATES* concurred—*Saunders* was much the most accurate of the reporters of his time: and he reports, "that all the court were of opinion that the *scilicet* was sufficient." The time of making the award is material: and therefore this allegation of it shall be taken affirmatively. And the date of the award appears to be so. The defendant might have taken issue upon it.

Mr. Justice *ASTON* was of the same opinion.

Per Cur. unanimously.

JUDGMENT for the plaintiff.

it is so far from being true, as here reported to have been said by *Wilmot J.* "that they all agree that it was positively enough alledged," for *Saunders* is the only one who reports it so. In 2 *Keble*. 361, the cause was adjudged without any thing having been said by any of the judges, except *Keeling*, who said it was not sufficient pleading; and in 2 *Kebl.* 388; *Taisden v. Windham*, seem to found their opinion on the case being on a general demurrer, as it was in effect; because though special, yet the objection insisted on was not shewed for cause, as appears by the pleadings, 1 *Saund.* 157; and the reasons of Mr. Justice *Wilmot* as here stated, are agreeable to the report of *Skinner v. Andrews*.

FONTAINIER *versus* HEYL.

1763.

Saturday, 22d June, 1765.

MR. Jones shewed cause against the rule which had been obtained by Mr. Attorney General, for the plaintiff to shew cause why an execution should not be set aside, and restoration, &c. made to the defendant, upon the foot of his being under a regular protection as the domestic servant of a foreign minister; viz. *valet de chambre* to Count Haslang.

Privilege from a foreign minister not allowed, unless the defendant swear to the nature of his employment, and to the actual performance of it.

Mr. Jones's cause was (and it was well supported by affidavits, as well as by writing under the defendant's own hand,) that he was a *trader*, and called himself *merchant*; and that the being *valet de chambre* to Count Haslang was mere sham and pretence. (And so it most plainly appeared to be.)

THE COURT saw it in the same light: and they held it necessary that the defendant himself ought, in these cases, to *shew* the nature of the service, and *swear* to the actual performance of it.

RULE DISCHARGED, as to the plaintiff; but made absolute as to the bailiffs, (who had not exculpated themselves from the charge of misbehaviour in executing this *feri facias*.)

REX *versus* INHABITANTS of ST. LUKE'S, in MIDDLESEX.

Wednes. 26th June, 1765.

See this case *abridged*, in the TABLE; and at *large*, in my SETTLEMENT-CASES in quarto, No. 174. Pa. 542. [S. C. 1 Bl. 553.]

REX *versus* BLAKE and fifteen others.

MR. Dunning shewed cause why an indictment should not be quashed.

Indictment for a forcible entry, not shewing any actual force, quashed upon motion. V. ante, S. P. in p. 1698.

He called it an indictment for a *forcible entry*; and argued "that an indictment for a forcible entry may be maintained at *common law*." He cited a case in *Trin.* 1753, 26, 27 G. 2. B. R. *Rex v. Brown and others*; and *Rex v. Bathurst*, *Tr.* 1755. 28 G. 2. S. P. *

But, N. B. This indictment at present in question was only for (*vi et armis*) breaking and entering a *close* (not a dwelling-house;) and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession.

[1732]
Rex v. Storr; and p. 1706.
Rex v. Atkins; and also Rex v. Gillet, p. 1707.
[See also 8 Durn. 538.]
• V. ante, p. 1699. in margin.

Mr. Popham, on behalf of the defendants, objected "that this was an indictment for a *mere trespass*, for a *civil injury*; not a public, but a *private* one; a mere entry into his *close*, and keeping him out of it. The

1765. "force and arms" is applied only to the entry; not to the expelling or keeping out of possession: *they* are only charged to be *unlawfully and unjustly*. This is no other force than the law implies. No actual breach of the peace is stated; or any riot; or unlawful assembly. And he cited the cases of *Rex v. Gask*; and *Rex v. Hide*; and *Rex v. Hide and another*: (which, together with a note upon them, may be seen in the text and margin of page 1769.)

REX
v.
BLAKE, &c.

Rex v. Bathurst is the only case where the objection has not been holden fatal: and that was, because it was a forcible entry into a *dwelling-house*.

Rex v. Jopson et al. Tr. 24, 25 G. 2. B. R. was an *unlawful assembly* of a great number of people. (V. ante pa. 1702. vol. 3. in the margin.)

Mr. Justice WILMOT---No doubt, an indictment will lie at common law, for a forcible entry; though they are generally brought on the acts of parliament. On the acts of parliament, it is necessary to state the nature of the estate; because there must be restitution: but they may be brought at common law.

Here the words "*force and arms*" are not applied to the whole: but *if* they were applied to the whole, yet it ought to be such an *actual* force as implies a breach of the peace, and makes an *indictable offence*. And this I take to be the rule, "that it ought to appear upon the face of the indictment to be an *indictable offence*."

[1733] Here indeed are sixteen defendants. But the number of the defendants makes no difference, in *itself*: no riot, or *unlawful assembly*, or any thing of that kind is charged. It ought to amount to an actual breach of the peace indictable, in order to support an indictment. For, otherwise, it is only a matter of *civil* complaint. And this ought to appear upon the face of the indictment.

Mr. Justice YATES concurred. Here is no force or violence shewn upon the face of the indictment, to make it appear to be an *actual force indictable*: nor is any riot charged; or any *unlawful assembly*. Therefore the mere number makes no difference.

Mr. Justice ASTON concurred, the true rule is, "that it ought to appear upon the face of the indictment to be an *indictable offence*."

Per Cur. unanimously,

RULE MADE ABSOLUTE,
to quash this indictment,

So that this point seems now to be fully settled.

The End of Trinity Term 1765, 5 G. 3.

Between the end of this term and the beginning of the next, viz. on Sunday, the 8th of September 1765, died Sir THOMAS DENISON, late second judge of this court.

MICHAELMAS TERM,

1734.

6 GEO. III. B. R. 1765.

RICORD *versus* BETTENHAM.

THIS was an action brought by the captain of a *French* privateer against the captain of an *English* ship called the *Syren*, for the ransom of the *Syren*, which had been taken by the *French* privateer.

It was tried before Lord *Mansfield*, at *Guildhall*, at the sittings after *Easter* term 1765.

There was a special case stated, for the opinion of this court, *viz.*

THAT it was an action brought by the plaintiff against the defendant on a *ransom-bill*: wherein the plaintiff declares, that whereas at the time of the capture after-mentioned, to wit, on the 24th day of *August* 1762, and before, there was an open war between the Lord *George* the third, then and still king of *Great Britain*, and the *French* king; and that during the time of such open war, to wit, on the same day and year aforesaid, the said *John Ricord*, then being a *subject of the French king* and commander of a certain privateer called the *Badine* then cruising upon the high seas to take the ships and effects of the subjects of the lord the present king of *Great Britain*, did, upon the high seas, in an hostile manner, *attack, conquer and take* a certain ship or vessel called the *Syren*, of great value; to wit, of the value of one thousand pounds, then the property of one *William Templer*, a subject of the lord the present king of *Great Britain*, whereof the said *John Bettenham* was then master and commander, and then proceeding upon a certain voyage; and whereas afterwards, to wit, on the same day and year aforesaid, at *London* aforesaid, to wit, in the parish of *St. Mary le Bow*, in the ward of *Cheap*, in consideration that the said *John Ricord* would, at the special instance and request of the said *John Bettenham*, *ransom and set at liberty* him the said *John Bettenham* and his said ship or vessel, and grant him one month's time from that day to repair to his destined port, he the said *John Bettenham* undertook, and to the said *John Ricord* then and there faithfully promised, *that he and his owners*

Friday, 8th
Nov. 1765.

[S. C. 1 Bl.
363.]

Action maintainable by an alien enemy on a ransom bill.

[See contra, 1 Doug. 30. and another like judgment given in B. R. was reversed in Cam. Scacc. and the law is now so settled by stat. 22 G. 3. c. 25.]

[See 2 Bl. 1326.

Doug. 619.
1 Bosan. 348.
3 Bosan. 200.
6 Durn. 28.]

[1735]

1765.
RICORD
V.
BETTEN-
HAM.

would pay to the said *John Ricord*, for the said ransom, the sum of 300 pistoles of foreign money, within two months then next ensuing; and that he the said *John Bettenham* would give for HOSTAGE *Joseph Bell* who was mate of the said ship or vessel, and would maintain the said *Joseph Bell* till the day of payment of the said ransom. And the said *John Ricord* in fact saith, that confiding in the promise and undertaking of the said *John Bettenham*, he the said *John Ricord* afterwards, to wit, on the same day and year aforesaid, at the request of the said *John Bettenham* did ransom and set at liberty him the said *John Bettenham* and his said ship or vessel; and did grant one month's time from that day, to repair to his destined port. And although he did give for *hostage* the said *Joseph Bell* (with his own consent) to the said *John Ricord*; who afterwards and after the expiration of the said time for the payment of the ransom-money, to wit, on the 9th day of *November*, in the year aforesaid, *DIED*, whereof the said *John Bettenham* afterwards, to wit, on the same day and year last aforesaid, had notice, that is to say, at *London* aforesaid, in the parish and ward aforesaid; yet the said *John Bettenham*, not regarding his promise and undertaking so made as aforesaid, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John Ricord* in this behalf, hath not performed his said promise and undertaking, in this, that the said *John Bettenham* and his owners did not nor did either of them, within the said two months or at any other time, pay the said 300 pistoles or any part thereof, or the value thereof in lawful money of *Great Britain* or otherwise, to the said *John Ricord*; although the said *John Bettenham* afterwards, to wit, on the same day and year last aforesaid, at *London* aforesaid in the parish and ward aforesaid, was by the said *John Ricord* requested so to do: but to perform his said promise and undertaking in this behalf, he the said *John Bettenham* hath altogether refused, and still doth refuse; and the said ransom-money still remains wholly due and unpaid, contrary to the form and effect of the said promise and undertaking of the said *John Bettenham*. And whereas during such open war as aforesaid, to wit, on the 24th day of *August* in the said year of our Lord 1762, the said *John Ricord*, then being a subject of the *French* king and commander of a certain other ship or vessel cruising on the high seas to take the ships and effects of subjects of the lord the present king of *Great Britain*, did, upon the high seas, in an hostile manner, attack, conquer and take a certain other ship or vessel whereof the said *John Bettenham*, a subject of our lord the present king of *Great Britain* was then commander, of great value, to wit, of

[1736]

the value of 1000*l.* proceeding upon a certain voyage; and whereas afterwards, to wit, on the same day and year aforesaid, to wit, at *London* aforesaid, in the parish and ward aforesaid, in consideration that he the said *John Ricord* had, at the special instance and request of the said *John Bettenham*, set at liberty the said *John Bettenham* and his said last mentioned ship, for a certain ransom, to wit, 300 pistoles, being foreign money, and had granted him one month from that day to repair to his destined port, he the said *John Bettenham* undertook, and then and there faithfully promised the said *John Ricord* to pay him the said last mentioned 300 pistoles within a certain time long since past, to wit, within two months then next ensuing; yet the said *John Bettenham*, not regarding his said last mentioned promise and undertaking, but contriving and fraudulently intending craftily and subtilly to deceive and defraud the said *John Ricord* in this behalf, hath not paid the said last mentioned 300 pistoles or any part thereof, or the value thereof, to the said *John Ricord*; although so to do, the said *John Bettenham* was frequently requested, to wit, at *London* aforesaid, in the parish and ward aforesaid, by the said *John Ricord*: but to pay the same or any part thereof to the said *John Ricord*, the said *John Bettenham* hath hitherto altogether refused, and still doth refuse. To which declaration the defendant pleaded the general issue, "that he did not undertake and promise, &c.:" and thereupon, issue was joined. The cause came on to be heard before Lord Mansfield, at Guildhall, London, the sitting after Easter term 1765: when it was agreed, that a verdict should be given for the plaintiff; damages 236*l.* and costs 40*s.* subject to the opinion of this court upon the following facts admitted by the counsel on both sides; viz.

THAT the capture of the *Syren*, by the *Badine* privateer commanded by the plaintiff, was four leagues off Cape Negritto, at sea, the 24th of August 1762.

THAT the plaintiff then was a natural-born subject of the FRENCH king; from whom the *Badine* had a commission; and the defendant a natural-born subject of GREAT BRITAIN: and that the *Syren* was the property of the defendant's owners, being BRITISH subjects.

THAT at the capture, a RANSOM-BILL was given, at sea, the said 24th of August 1762, signed by the plaintiff, the defendant, and Joseph Bell the defendant's mate (who was given as a hostage to the plaintiff:) which ransom-bill was in the words following, viz. "I the underwritten
" *John Ricord*, captain of the privateer called the *Badine*
" of Port au Prince, belonging to Mr. Antony Burgaret,
" have agreed with Mr. John Bettenham, captain of the

1765.
RICORD
v.
BETTEN-
HAM.

[1737]

1765.
RICORD
V.
BETTEN-
HAM.

" *English* vessel, and taken under the said colours,
" of the port of *Piscatua* on the coast of *New England*,
" belonging to Mr. *William Temple*, at present bound
" from *Jamaica* to take in her loading at *Lucca Martha*
" *Brae* in the said island, and was taken four leagues to
" the northward of *Point Negrillo*; viz. that I the said
" *John Ricord* acknowledge to have ransomed the afore-
" said captain and his said vessel called the *Syren*, for the
" price and sum of 300 pistoles; and have granted to the
" said captain to repair to his destined port, and to begin
" from the day of the date of these presents. And I the
" said *John Bettenham* oblige myself and owners to pay,
" within two months from the date hereof, the said
" aforementioned sum, and give for hostage my mate
" called *Joseph Bell*, whom I also oblige myself to
" maintain till the day of payment of the said ransom.
" In testimony whereof we have signed together; that
" this may be authentic, as if executed before a notary
" public: on board the *Badine*, this 24th of *August* 1762.
" *John Ricord. John Bettenham. Joseph Bell.*"

THAT the value of the ransom-bill, being 300 pistoles, amounted to 236l. sterling: and that the ship *Syren* was of a greater value.

THAT the said *Joseph Bell* DIED in prison, at *Port au Prince*, on 12th *October* 1762.

THAT the *Syren*, after her having been so ransomed, arrived at her destined port of *Lucca Martha Brae*:

[Foster, 219.] THAT at the time of the capture, and till the 3d day of *November* 1762, there was an ACTUAL WAR between *Great Britain* and *France*.

QUESTION—Whether, upon these facts, the plaintiff is intitled to recover in this action.

The material substance of this case is the taking of this ship by the *French*, in a time of open war; that the *English* captain was a natural-born subject of *Great Britain*; and the *French* captain, a natural born subject of *France*: that the ship was taken in *August* 1762, and ransomed, and a ransom-bill given for 300 pistoles (which are equivalent to 236l.) and that his mate, *Joseph Bell* who died in prison, was given as an hostage.

[1738] Mr. *Chambers* argued on behalf of the plaintiff, upon *Friday* the 21st of *June* last; and Mr. *Dunning* for the defendant.

Mr. *Chambers* begun with clearing the case of objections. It may be objected, he said (1st.) That this action is brought *coram non judice*; (2dly.) That the plaintiff is an alien; and (3dly.) That the death of the hostage puts an end to the contract.

As to the first point, he said that the want of jurisdiction ought to have been pleaded in abatement, and before

impairance: and he cited 22 H. 6, 7. pl. 9. *Bro. Abr.* Title *Jurisdiction*, pl. 88. and Title *Privilege* 15. and *Continuance* 70. *Hardr.* 365. *Clapham v. Sir John Lenthall*; 1 *Lutw.* 46. *Wentworth v. Squib*; *Carthew* 11. *Jennings v. Hankyn*; *Carthew* 354. *Davis v. Stringer*; and 4 *Inst.* 213, 244. between Sir John Egerton and William Earl of Derby.

1765.
RICORD
V.
BETTEN-
HAM.

But after issue is joined, no exception to the jurisdiction can be allowed.

However, the jurisdiction of the court of Admiralty is not exclusive of the jurisdiction of this court. They have *concurrent* jurisdiction, 4 *Inst.* 134.

Second point. This objection comes likewise too late now. They should have pleaded it in abatement. But an alien *friend*, or even an alien *enemy*, under *some* circumstances, may maintain a *personal* action. 1 *Salk.* 46. *Wells v. Williams*. *Moore* 431. *Watford v. Masham*.

This is not an illegal contract with an enemy; but a transaction arising from an act of hostility. A captive may redeem his life by a ransom: and money actually paid down, or a *promise of money* to be paid in future, are equally allowable. It mollifies the rigour of conquest. It is a case of necessity. The victor might, otherwise, even kill his captive.

Third point. The contract did not become extinct by the *death of the hostage*. The giving of a hostage is a *collateral* contract. A hostage is *not an equivalent*, but a collateral security. It is only strengthening the obligation, by giving a pledge. But giving a pledge does *not discharge* the debt. *Yelv.* 178. *Sir Jo. Rutcliffe v. Davis*. 2 *Strange* 919. *The South-Sea Company v. Duncombe*. 2 *Salk.* 522. *Digest, Lib.* 20. Title 5. *Lex* 9.

These objections being removed, no difficulty remains.

Mr. *Dunning*, *contra*, for the defendant, said, that this is an action of the first impression: no such action has ever been brought, though the case must be frequent; *nor* does a *reciprocal* action lie in *OTHER* nations.

[1739]

He proposed to consider the case under four heads; *viz.*

1st. As on a *written* instrument, *without* hostage;

2dly. As on a *written* instrument, *with* hostage; (which he looked upon to be a material part of the engagement.)

3dly. Though the action might be maintainable in the admiralty-court; yet it is *not* maintainable here.

4thly. The ransom-bill was obtained under *duress*.

(But he almost gave up to the two last objections.)

First point. No such contract as this is, can, *of itself*, support an action. It is *void*, from the *condition* of the contracting parties.

1765.
RICORD
v.
BETTEN-
HAM.

The plaintiff is under an incapacity of either contracting, or suing: *not* indeed as an *alien* generally, but as an *alien enemy*. If he sued merely as an *alien*, it should have been taken in time and pleaded in abatement. But this plaintiff was an *alien enemy*. Therefore no suit could have been maintained between the parties, at the time of making the contract; nor could any suit have been maintained between the parties, at the time of the breach of the contract; and a personal action once suspended is gone for ever. Here is a fundamental radical defect. No action could accrue upon a contract made with an *alien enemy*, in time of actual open war.

Being an *alien enemy* is pleadable in *MAR*, and concludes to the action. *Co. Lit.* 129. *b.* is express in point. *Comberb.* 212, 394.

19 E. 4, 6. *pl.* 4. and *pl.* 6. prove that "an alien enemy cannot maintain an action." *Bro. Abr.* title *Denizen and Alien*, *pl.* 20. In *Carter*, 49, 50, and 191. *Richfield et Uxor v. Udall*—"An alien, executor, may maintain an action; because he sues in *tauer droit*." But in *Cro. Eliz.* 142, *pl.* 7. it was holden a good plea to an action of debt brought by an executor, "that the plaintiff was an alien *nee* at *graunt* under the obedience of Philip King of Spain, enemy to the queen."

But it is said "that *this*, being for a ransom, turns upon the necessity of the case: for, otherwise, the vanquished might be killed by the victor."

Answer—Allowing the contract to be prudent, and even lawful, yet it ought to be secured by an *hostage*. This is the obvious method of securing it: and this contract is so secured.

Second point—This contract being so secured by a hostage, the *ransom-bill* is not an *independent* substantial agreement; but *relative to the hostage*. The *hostage* himself is not bound to pay the ransom; although he has signed the paper. It is the captain only, who obliges himself and his owners. This obligation, if not obtained by what is strictly called *duress*, was at least *not voluntarily* entered into. If the captain could thus bind himself, his ship and owners, what need could there be of an *hostage*? The *hostage* therefore is a *security*, and the principal, if not the *only* security.

He said, it astonished him, that all foreign writers (except *Grotius* and *Puffendorf*) are silent upon this subject: and they do not say much about it.

* He cited it as section 7, but it is the sixth section.

But *Molloy*, *Lib.* 1. *cap.* 8. § * 7. "says, that "if hostages are taken, he that gives them is freed from his faith: for that in receiving hostages, he that receives them hath relinquished from the assurance which he had in the faith of him that gave them."

[1740]

An action upon a ransom-bill was never attempted, even in the court of *Admiralty*: nor will it lie in *France*.

But he admitted, that actions had been brought in the *Admiralty*, by the *hostage* against the owners who refused to ransom him; and he thought that *such* an action would lie even in this court. But that will not be material in the present case.

Mr. *Chambers*, in reply, cited some other authorities: particularly, *Les Usages et Coutumes de la Mer: Guidon, Rachats et Compositions; Grotius, Lib. 3. c. 20. § 58. and c. 23. § 16. Zouch de jure et judicio feziali, part 2. c. 54. Ordonnances de Louis 14, Touchant la Marine*: which proved, he said, that this was a contract allowable by the law of nations. And if the contract is allowed by the law of nations, the action must lie in them *all*.

He made some observations in answer to Mr. *Dun-* [1741]
ning.

In this declaration, it only appears that the *capture* was during the war; it does not appear that the *contract* was so.

A right may commence, *before* the *right of suing* accrues. But supposing he could not have brought his action during the war; yet he may in time of peace. A right may revive.

An alien enemy may sue as executor; or for an account.

In a case in Chancery, Lord *Hardwicke* over-ruled a plea of "alien enemy," pleaded by Serjeant *Kettleby*, to a bill brought for an account. [Contra, 2 Anstruther 462, 468.]

A contract made during a war may be effectuated during a peace.

It is for general convenience, that an alien enemy may be an executor. And 19 *E. 4. G.* and *Brouke* title *Denizen* and *Alien*, pl. 20. are not law.

The *hostage* is *not* the *principal* security; but *collateral*, and not the subject matter of the contract: for which he cited *Zouch*, *Grotius*, and other authorities. But if the *hostage* were the *principal* security, yet his death does not discharge the *debt*.

Molloy, Lib. 1. c. 8. relates to *public* hostages, upon leagues and treaties. Besides, other opinions are against him.

Uterius Concilium.

Mr. *Blackstone* who was to have argued for the defendant, upon a second argument now said, he had made inquiries abroad, and had answers from very eminent lawyers of *France* and *Holland*, "that such an action had been allowed, and upon principles that could not be disputed." Therefore he did not choose to argue

1765.
RICORD
V.
BETTEN-
HAM.

1765.

RICORD

v.

BETTEN-

HAM.

[1742]

it. For, the only objection which seemed to weigh upon the former argument, was, "that such an action would not lie in the other countries of *Europe*."

Lord MANSFIELD said, THE COURT were all of the same opinion.

N. B. There were a few other actions of the same kind depending: but upon this judgment, (which gave universal satisfaction) the ransoms were paid.

Per Cur.—unanimously,

Let there be JUDGMENT for the PLAINTIFF.

See *Puffendorf*, *Lib.* 8. c. 7. § 14.

and *Grotius*, *Lib.* 3. c. 23. *de fide privatâ in bello*.

MONEY et al'. *versus* LEACH.

[S. C. 1 Bl.

555.]

Roll 60.

ERRORS having been assigned upon the* bill of exceptions mentioned in page 1622, they now came on to be argued.

This was an action of † trespass brought in the court of *Common Pleas* by *Dryden Leach*, against three king's messengers, *John Money*, *James Watson*, and *Robert Blackmore*, for breaking and entering the plaintiff's house, and imprisoning him, without any lawful or probable cause; to the plaintiff's damage of 2000l.

The defendants below, pleaded two pleas. The first was the general issue, "not guilty:" on which issue was joined,

The other plea (pleaded by leave of the court) was a special justification, as to the breaking and entering of the plaintiff's dwelling-house, and staying and continuing therein for six hours, and making the assault upon him, and seizing, taking, and imprisoning him, and keeping and detaining him in prison for four days; as to all which, they say, that before the committing of the supposed trespass, viz. on 19th April 1763, the king made a speech from the throne, &c. in which speech was contained the following declaration, &c. &c. That on the 23d April 1763, a certain seditious and scandalous libel or composition, intitled "The North Briton, No. 45," was unlawfully and seditiously composed, printed, and published concerning the king and his said speech: in which libel were contained, &c. &c. &c. That the Earl of *Halifax* was then one of the privy council, and one of his majesty's principal secretaries of state; and that information was given to him of the said publication of the aforesaid libel; and the said libel was then shewn and produced to the said earl; and he thereupon in due manner

1 Bl. Com. 391
See the
549th and
559th Rolls of
C. B. of Mich.
term, 4 G. 3.
and below, p.
1746, at large.
This was also decided
in this case that
Constable &c.
order to avail
himself of the
objects that no
demand of the
warrant has been
made accordingly
to 249 2c 44
sect 67 must
show that he
acted in obedience
to the warrant
and see *Millin*
v. *Green* 5 L. R.
233- Bell
v. *Oakley* 4c
24 45 239.
5 L. R. 446.

1765.

MONEY
et al.'

v.

LEACH.

issued his WARRANT in writing under his hand and seal, directed to *Nathan Carrington*, and these three defendants who were then four of his majesty's messengers in ordinary; by which warrant, the said earl did in his majesty's name authorise and require them, taking a constable to their assistance, to make strict and diligent search for the said authors, printers, and publishers of the aforesaid seditious libel intituled "The North Briton, No. 45, April 23d, 1763;" and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before the said earl, to be examined concerning the premises, and to be further dealt with according to law: in the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all others his said majesty's messengers, officers civil and military, and loving subjects whom it might concern, were to be aiding and assisting to them the said *Nathan Carrington, John Money, James Watson, and Robert Blackmore*, as there should be occasion. They further say, that for 44 weeks and upwards before the issuing of the said warrant, certain weekly compositions intituled "the North Briton," and respectively numbered, in a progressive order, had been printed and published on *Saturday* in every week: and that the said seditious libel intituled "The North Briton, No. 45, Saturday April 23d, 1763," was one of the said weekly compositions. They say that the plaintiff followed and exercised the art and business of a printer; and did in fact print and cause to be printed one of the said weekly compositions intituled the "North Briton;" to wit, the North Briton, No. 26, and that after the issuing of the aforesaid warrant and before the committing of the said supposed trespass, to wit, on 27th April 1763, information was given to them the defendants, "that the said *Dryden Leach* and his servants were the printers of the aforesaid seditious libel intituled "The North Briton, No. 45, Saturday, April 23d, 1763." Whereupon the defendants, being his majesty's messengers in ordinary as aforesaid, took to their assistance a certain constable, to wit, one *Thomas Freeman*, who was then a constable of the parish of *St. Margaret, Westminster*, in the county of *Middlesex*, to aid them in the execution of the aforesaid warrant; and, together with the said constable entered into the aforesaid dwelling-house of the said *Dryden Leach*, in which the said *Dryden Leach* carried on his aforesaid business of a printer, the door thereof being then open, to search for the printers of the said seditious libel, in order to carry them before the said Earl of *Halifax*, to be examined concerning the same; and thereupon, the said defendants, together with the constable aforesaid, did then and there find, within the

1765.
MONEY
et al.
v.
LEACH.

same house, a *newly printed* copy of one of the said weekly compositions infilled "The North Briton," and also an *unfinished copy of part of another* of the said compositions then also *newly printed*, and which said newly printed copies were part of a *new edition*, which the said *Dryden Leach* and his servants were then and there *re-printing*, of the aforesaid weekly compositions. Whereupon, the defendants, together with the constable above-named, did gently lay their hands on the said *Dryden Leach*, and seized and took him into their custody, in order to bring him before the said Earl of *Halifax*, to be examined concerning the said seditious libel, and in so searching for the printers of the seditious libel, and seizing and taking the said *Dryden* as aforesaid, did then and there necessarily stay and continue in the said house of the said *Dryden* for the space of six hours, part of the time in the declaration mentioned. And because the said Earl of *Halifax* was, during all the said space of four days, part of the aforesaid five days in the said declaration mentioned, employed in other business belonging to his said office of secretary of state, so that the said *Dryden Leach* could not then or during the said four days be brought before the said earl for the purpose aforesaid, they the said defendants, together with the constable aforesaid, did keep and detain the said *Dryden Leach* in their custody for the said space of four days, part of the said time in the declaration mentioned, in order to carry him before the said Earl of *Halifax*, for the purpose aforesaid. They further say, that at the end of the aforesaid four days, and not before, upon the examination of the said *Dryden Leach* and certain other persons who were then and there examined concerning the premises, it appeared to the said Earl of *Halifax*, "that the said *Dryden Leach* did not print the said seditious libel in: "titled the 'North Briton, No. 45, Saturday, April "the 23d, 1763:" and thereupon, the said defendants, by the command of the said Earl of *Halifax*, did then and there *release* the said *Dryden Leach* out of their custody, and discharged and set him free from that imprisonment. Which are the same breaking and entering of the aforesaid dwelling-house of the said *Dryden Leach*, in the declaration mentioned, in which, &c. and staying and continuing therein for the space of six hours, part of the time in the same declaration mentioned; and also as to the making of the aforesaid assault upon the said *Dryden Leach* and seizing, taking and imprisoning of the said *Dryden Leach*, and detaining him in prison for the space of four days, part of the said time in the said declaration mentioned, above supposed to have been done by the defendants, whereof the said *Dryden* hath above complained against them. And this they are ready to verify. Where-

fore they pray judgment, if the said *Dryden* ought to have or maintain his aforesaid action thereof against them, &c.

*The plaintiff replied, as to the said plea in bar as to the breaking and entering the dwelling-house, and staying and continuing there six hours (part of the time in the declaration mentioned,) and also as to the making of the assault upon him, and seizing, taking and imprisoning of him, and keeping and detaining him in prison for four days (part of the time in the declaration mentioned;) that the defendants, of *their own wrong* and *without the cause* by them in their plea alledged, broke and entered his dwelling-house, and staid and continued therein for six hours and made an assault upon him, and seized, took and imprisoned him, and kept and detained him in prison for the four days in plea mentioned (part of the time in the declaration mentioned,) in manner and form as he has above complained against them. And upon this issue was joined.

The cause came on to be tried before Ld. Ch. Just. *Pratt*, on the 10th of *December* 1763, at *Guildhall*: and the jury found a verdict for the plaintiff upon both issues; and gave him damages 400l. besides his costs and charges, &c. On 16th June 1764, judgment was signed for the plaintiff, for 400l. damages, and 51l. 16s. 8d. costs.

At the trial, a bill of exceptions was tendered and received; which stated the issues, the coming on to trial, &c. and the evidence, and described a printed paper intitled "The North Briton, No. 45." and the information given thereof to the secretary of state, and his warrant to the defendants below, together with another king's messenger, *Nathan Carrington*; and what Mr. *Carrington* had been told of Mr. *Leach's* being the printer of it; and their thereupon entering his house, and finding some of the other numbers of the same paper newly printed by him; and their thereupon taking him into custody, in order to carry him before the Earl of *Halifax*, one of his majesty's principal secretaries of state; and that he, appearing *not* to be either author, printer or publisher of the said paper called "The North Briton," No. 45. was discharged by them, by the Earl's order, without being ever carried before him. They say, that their evidence intitled them to the benefit of the statute of 24 G. 2. c. 44. Though it was denied by the counsel for the plaintiff *Leach*, that either they or the secretary of state himself were *within* that statute, or those of 7 Jac. 1. c. 5. or 21 Jac. 1. c. 12. (the former of which, being only temporary, was made perpetual by the latter, and by which liberty is given to *justices of peace* and all others acting

1765.
MONEY
et al.
v.
LEACH.

under their command "to plead the general issue, and give
" the special matter in evidence.")

*That the chief justice of the *Common Pleas* was of
" opinion that their evidence was not sufficient to bar
" the plaintiff of his action:" whereas, the bill of excep-
tions insists " that it was."

This bill of exceptions being sealed, and the seal ac-
knowledged as is beforementioned, the defendants below
assign errors: and a joinder in error was put in by the
plaintiff *Leach*.

The assignment of errors was to the following effect:
(it may be seen at large, in the 60th roll of *Easter Term*
5 G. 3. B. R.)

The defendants come, on *Wednesday* next after fifteen
days of *Easter* 4 G. 3. before our lord the king at *West-*
minster, and say, that at the trial, their counsel proposed
exceptions to the opinion of the Lord Chief Justice *Pruitt*;
which exceptions were written in a bill, and sealed by the
chief justice; which bill of exceptions the defendants
now bring into this court, and pray a writ to the chief
justice, to confess or deny his seal; which writ is granted
to them returnable on the morrow of the Ascension. At
which day, before our lord the king at *Westminster* come
the defendants in their proper person, and the said chief
justice of the *Common Pleas* likewise in his proper person,
and acknowledges his seal put to the said bill of excep-
tions. (The form and ceremony of his doing this may be
seen in page 1692.) Then they set out the bill of excep-
tions, *verbatim*, " Be it remembered, &c." It recites all
the proceedings particularly and minutely, from the very
beginning to the end, concluding with the verdict of the
jury: which it would be tedious to repeat, as they have
been already sufficiently specified. They are entered upon
the rolls 549 and 550 of the court of *Common Pleas*, (in
Michaelmas Term 4 G. 3.) The defendants (now become
plaintiffs in error) then alledge, (in their said bill of ex-
ceptions) that upon the trial, the counsel for the plaintiff
Leach, in order to prove the defendants guilty of the tres-
pass, gave in evidence " that on 29th April 1763, the de-
fendants entered the plaintiff's dwelling-house, searched
" it, and continued in it four hours; seized and took
" *Leach* into their custody against his will and consent;
" and kept and detained him in their custody against his
" will and consent for four days:" which was all the trespass,
assault and imprisonment committed by the defendants
or any of them. Whereupon their counsel, in order to
bar the said action, and to acquit them thereof under the
general issue above pleaded, gave in evidence and proved
" that before the committing of the trespass, the king
" made a speech from the throne, &c. containing the

"several expressions stated in the second plea of the defendants: and that afterwards and before the supposed trespass, a paper intitled "The North Briton, No. 45. &c. was printed and published; and that the same contained the several matters set forth in their said second plea:" and it was proved on their behalf, "that the Earl of *Halifax* was, all that time, one of his majesty's principal secretaries of state, and one of the privy council; and that information was given to him of the said publication of the abovementioned paper; and the same was then shewn to him; and that thereupon the said earl issued his warrant in writing under his hand and seal directed to *Nathan Carrington* and the defendants, who were then four of his majesty's messengers in ordinary." And their counsel then produced and gave in evidence the *warrant* aforesaid, which was in the words and figures following, that is to say, "*George Montagu Dunk*, Earl of *Halifax*, Viscount *Sunbury* and Baron *Halifax*, one of the lords of his majesty's most honourable privy council, lieutenant-general of his majesty's forces, and principal secretary of state, &c.— These are in his majesty's name to authorize and require you, taking a constable to your assistance, to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper intitled "The North Briton, No. 45. *Saturday April 23. 1763.* printed for *G. Kearsley* in *Ludgate Street London*; and them or any of them having found, to apprehend and seize, together with their papers, and to bring in safe custody before me, to be examined concerning the premises and further dealt with according to law. In the due execution whereof, all mayors, sheriffs, justices of the peace, constables, and all other his majesty's officers civil and military, and loving subjects whom it may concern, are to be aiding and assisting to you, as there shall be occasion. And for your so doing, this shall be your warrant. Given at *St. James's* the 26th day of *April 1763*, in the third year of his majesty's reign. *Dunk Halifax.* To *Nathan Carrington, John Money, James Watson, and Robert Blackmore*, four of his majesty's messengers in ordinary." And it was further proved on behalf of the said defendants, "that several of the like warrants had been granted, at different times, from the time of the revolution to the present time, by the principal secretaries of state, and had been executed by the messengers in ordinary, for the time being; and that the paper in the said warrant described was the said paper so printed and published as aforesaid; and that the warrant aforesaid, before the committing of the supposed trespass, to wit, on the 26th day of

1766.
MONEY
et al
v.
LEACH.

1765.
MONEY
et al.
v.
LEACH.

" *April* aforesaid in the year of our Lord 1763, was delivered to the defendants, to be executed;" and "that they" were then three of his majesty's messengers in "ordinary and still are so." It was also proved, on their behalf, "that for forty weeks and upwards next before the issuing of the aforesaid warrant, certain weekly compositions intitled *The North Briton* had been printed and published on *Saturday* in every week; and that the aforesaid paper intitled *The North Briton*, No. 48. *Saturday, April 23, 1763*, described in the said warrant, being one of the said weekly compositions, was printed and published before the issuing of the said warrant, to wit, on the 23d day of *April 1763*; and that after the issuing of the above-mentioned warrant, and before the committing of the said supposed trespass, to wit, on the 28th day of *April* in the year aforesaid, the defendants were informed by *Nathan Carrington*, one other of the messengers in the said warrant named and one of the persons to whom the said warrant was directed, that from the information he had received he was of opinion that the said *Dryden Leach* who then and long before was and still is a printer in the city of *London* aforesaid, was the printer of the said weekly compositions intitled *The North Briton*; for that he the said *Carrington* had been informed that one *Mr. Wilkes*, a person supposed to be the author of the said weekly compositions, had been seen frequently to go into the said *Mr. Leach's* house, and that an old printer, whose name he the said *Carrington* did not mention to the defendants, had told him that the said *Mr. Leach* was the printer of the said compositions; and that thereupon the defendants took to their assistance a constable, and with the constable entered *Leach's* dwelling-house (the door being open) to search for the said *Leach* and his books and papers, and to bring him together with his books and papers in safe custody before the said *Earl of Halifax*, to be examined concerning the premises and to be further dealt with according to law; and upon that occasion did search the said house, and necessarily continued therein for the said space of four hours." And it was further given in evidence and proved on the part of the said defendants, "that upon that search, the defendants did find *Leach* in the said house, and did also then find a newly-printed sheet containing a copy of one of the said weekly compositions, intitled *The North Briton*, No. 1. and part of a copy of another of the said weekly compositions, intitled *The North Briton*, No. 2: which sheet was printed by the said *Dryden Leach*." And it was further proved, "that the said *Dryden Leach* did also print one of the said

" weekly compositions, intituled the North Briton, No.
 " 26. And the defendants, with the assistance of the
 " constable did seize and take into their custody the said
 " *Dryden Leach*, in order to *bring him in safe custody
 " before the said Earl of *Halifax*, to be examined con-
 " cerning the premises; and on that occasion did keep
 " and detain him in their custody for the space of four
 " days; at the end of which time, it appearing by the
 " examination of divers persons then taken, touching
 " the author, printer and publisher of the said paper, that
 " the said *Dryden Leach* was *not* the author, printer or
 " publisher thereof, the defendants, by the command of
 " the said Earl of *Halifax*, *released and discharged* him
 " from that imprisonment: but the said *Dryden Leach*
 " *was never carried before or examined by the said Earl of*
 " *Halifax*. And that the entering the house of the said
 " *Dryden Leach*, and searching the same, and taking
 " into and detaining in their custody him the said *Dryden*
 " *Leach* in the manner and on the occasion herein before
 " stated, were the *whole* of the trespass, assault and im-
 " prisonment committed by the said defendants or any
 " of them." But it was proved on the part of the said
Dryden Leach, " that he was *not* the *author, printer or*
 " *publisher* of the said paper intituled The North Briton
 " No. 45, in the said warrant mentioned, nor of any *other*
 " numbers of the said weekly compositions, except as
 " before stated." Whereupon the counsel for the de-
 " fendants insisted before the said chief justice, that the
 " said several matters so produced and given in evidence on
 " their part as aforesaid were *sufficient and ought to be ad-*
 " *mitted and allowed as decisive evidence* to intitle them to
 " the benefit of the statute of 24 G. 2. intituled " an act for
 " rendering justices of the peace more safe in the exe-
 " cution of their office, and for indemnifying constables
 " and others acting in obedience to their warrants;" and
 " that therefore the said *Dryden Leach* ought to be barred
 " of his aforesaid action, and the said defendants acquitted
 " thereof. And thereupon the said defendants, by their
 " counsel aforesaid, did then and there pray of the said
 " chief justice to admit and allow the said matters and proof
 " so produced and given in evidence for the said defendants
 " as aforesaid, to be *conclusive evidence* to intitle the said
 " defendants to the benefit of the statute aforesaid, and to
 " bar the said *Dryden Leach* of his action aforesaid. But
 " to this, the counsel for the plaintiff then and there insisted
 " before the chief justice, that the matters and evidence
 " aforesaid so produced and proved on the part of the de-
 " fendants as aforesaid, were *not* sufficient, nor ought to be
 " admitted or allowed to intitle the said defendants to the
 " benefit of the statute aforesaid, or to bar the said *Dryden*

1765.
 MONEY
 et al.
 v.
 LEACH.

1765.
MONEY
'et al.'
v.
LEACH.

[1750]

Leach of his aforesaid action ; and that neither the said defendants of any of them, nor the said Earl of *Halifax*, were or was *within the words or meaning* of the statute made in the *seventh* year of his late majesty King JAMES the first, intituled " an act for ease in pleading against " troublesome and contentious suits prosecuted against " justices of the peace, mayors, constables, and certain " other his majesty's officers, for the lawful execution of " their office ; " nor of the statute made in the *twenty-first* year of the reign of the *same late king*, intituled " an act to " enlarge and make perpetual the act made for ease in " pleading against troublesome and contentious suits, " prosecuted against justices of the peace, mayors, constables, and certain other his majesty's officers, for the " lawful execution of their office, made in the 7th year " of his majesty's most happy reign ; " nor of the said statute made in the *twenty-fourth* year of the reign of his late majesty King GEORGE the second ; nor in any wise intituled to the benefit of any of those statutes. AND the counsel for the said *Dryden Leach* further insisted, that the seizure and imprisonment of the said *Dryden Leach* were not made and done *in obedience to the said warrant*, nor had the said defendants or any of them, in that behalf, *any authority thereby*. AND the said chief justice did then and there declare and deliver his *opinion* to the jury aforesaid, " that the said several matters so produced and " proved on the part of the defendants were *not*, upon the " whole case, sufficient to bar the said *Dryden Leach* of " his aforesaid action against them ; " and, *with that opinion*, left the same to the said jury. WHEREUPON the said counsel for the said defendants did then and there, on behalf of the said defendants, *except* to the aforesaid opinion of the said chief justice : and insisted on the said several matters and proofs as an *absolute bar* to the aforesaid action, by virtue of the last mentioned statute. AND inasmuch as the said several matters so produced and given in evidence on the part of the said defendants, and by their counsel aforesaid objected and insisted on as a bar to the action aforesaid, *do not appear by the record* of the verdict aforesaid, the said counsel for the aforesaid defendants did then and there *propose their aforesaid exception* to the opinion of the said chief justice, and *requested* the said chief justice to *put his seal* to this BILL of exception containing the said several matters so produced and given in evidence on the part of the said defendants as aforesaid, according to the form of the statute in such case made and provided : and thereupon the aforesaid chief justice, at the request of the said counsel for the above-named defendants, *did put his seal* to this bill of exception, pursuant to the aforesaid statute in such case made, and provided, on the 10th day of *December* aforesaid,

in the said fourth year of the reign of his said present majesty.

C. PRATT. L.S.

AND HEREUPON the said *John Money, James Watson, and Robert Blackmore* say, that in the record and proceedings aforesaid, and also in the matters recited and contained in the said bill of exception, and also in giving the verdict upon the said issue between the parties aforesaid first above joined, and also in giving the judgment aforesaid, there is manifest error, in this, that the chief justice before whom, &c. at and upon the trial of the said issue between the parties aforesaid first above joined, did declare and deliver his opinion to the jury aforesaid, "that the said several matters mentioned in the said bill of exceptions, and so as aforesaid produced and proved on the part of the said *John Money, James Watson, and Robert Blackmore*, were not, upon the whole of the case, sufficient to bar the said *Dryden Leach* of his action aforesaid against them;" and, with that opinion, left the same to the jury. There is also error in this, that by the record aforesaid it appears that the verdict aforesaid was given upon the said issue first above joined, for the said *Dryden Leach*, against them the said *John Money, James Watson, and Robert Blackmore*: whereas, by the law of the land, the verdict on that issue ought to have been given for the said *John Money, James Watson, and Robert Blackmore*, against the said *Dryden Leach*. There is also error in this, that it appears by the record aforesaid, that judgment in form aforesaid was given for the said *Dryden Leach*, against them the said *John Money, James Watson and Robert Blackmore*: whereas, by the law of the land, the judgment aforesaid ought to have been given for them the said *John Money, James Watson, and Robert Blackmore*, against the said *Dryden Leach*. AND the said *John Money, James Watson, and Robert Blackmore* pray that the judgment aforesaid, for the errors aforesaid, and others in the record and proceedings aforesaid, may be reversed, annulled and altogether had for nothing; and that they may be restored to all which they have lost by occasion of the judgment aforesaid, &c.

AND HEREUPON, the said *Dryden Leach*, in his proper person, voluntarily comes here into court, and prays leave to rejoin to the errors aforesaid, before our lord the king, until on the morrow of the *Holy Trinity*, where-soever, &c.: and he hath it, &c. The same day is given to the said *J. M. J. W. and R. B.* at which day come the parties aforesaid in their proper persons: and the said *Dryden Leach* says "that there is not, either in the record" and proceedings aforesaid, or in the matters recited

1765.

MONEY
et al.

v.

LEACH.

[1751]

1766.
MONEY
et al.
v.
LEACH.

" and contained in the said bill of exceptions, or in giving
" the verdict aforesaid or in the judgment aforesaid, any
" error : " and prays that the court here may proceed
to the examination as well of the record and proceed-
ings, as of the matters aforesaid above assigned for error ;
and that the judgment aforesaid may be affirmed in all
things.

[1752] THIS CASE was first argued on Tuesday 18th of June
last, by Mr. Solicitor General *De Grey* for the plaintiffs
in error ; and by Mr. *Dunning*, for the defendant in error.

Mr. *De Grey* divided his argument into three points---

1st. The defendants had a right to plead the general issue,
and to give the special matter in evidence, under 7 Jac. 1,
c. 5 : or, in other words, Lord *Halifax*, the secretary of
state, was a justice of peace, within the intention of that act.

2dly. The evidence was sufficient to intitle the defend-
ants to a verdict. Which will take in both the vali-
dity of the warrant itself, and the manner of executing it.

3dly. They were also intitled to a verdict within the
meaning of 24 G. 2. c. 44. the plaintiff not having observed
the terms required by it.

First point—Before the statute of 7 Jac. c. 5. a mat-
ter of special justification could not be given in evidence
by a justice of peace, upon the general issue pleaded
by him.

The question is—*Who were meant*, in that act of parlia-
ment, by *justices of the peace*.

Some persons were, from ancient times, so, by of-
fice ; some are so by special commission ; some, by cor-
poration-charters ; some, by tenure : some, by prescription.

In the time of *Edward* the third, other persons were
authorized to act within particular districts.

But the great officers of the state had the jurisdiction, as
incident to their offices. So had, in some degree, coroners
and other inferior officers.

The secretaries of state must have had it as incident to
an office so ancient as to be coeval with the crown itself.

* V. Artic.
super Chartas.
28 E. 1. c. 6.

A statute in *Edward* the first's reign says * " desouth
le *Petit Seale*, ne issera desormes nul briefe que touch
le common ley." And Lord *Coke*, in his comment upon
it, in his 2 *Inst.* 556. calls it the *signetum*, the king's signet,
which at the making of that statute the king had ; and
says—" This scale is ever in the custody of the principal
secretary : and there be four clerks of the signet attend-
ing on him."

[1753] This seal is as ancient as the crown ; and the officer
that keeps it, as ancient as the seal itself ; and he is an
officer well known, and recognized by many acts of par-
liament ; and the king's warrants are countersigned by
him.

In cases of *treason*, and of *felony*, the courts of law recognize his authority : and there is equal reason for it, in cases of *misdemeanour* : which equally affect government, and disturb the public peace.

A *seditious libel* is an offence against government and the public peace ; and effectually undermines government.

A secretary of state is a centinel for the public peace : it is his duty to prevent the violation of it, and to bring the offenders to justice ; and it is necessary that he should be invested with this power, in order to enable him to execute this his duty.

The case of *Rex v. Kendal and Roe*, 1 Salk. 347. * has * V. 5 Mod. settled this point, as to treason : for, it was there holden 78. S. C. and " that secretaries of state might commit for suspicion of State Trials, " treason, as conservators of the peace did at common vol. 4. p. 851. " law ; and that it was *incident* to the office, as it is and Comberb. 343. Holt, 144. " to the office of justices of peace, who do it *ratione* Skinner, 596. " *officij*." And the commitment to a messenger was there and 12 Mod. holden good. 82.

In the case of the *Queen v. Derby*, B. R. 1709. 10 Ann. † † Fortescue's for publishing a scandalous and seditious libel called The Rep. 140. *Observer*—The two points abovementioned were admitted by Mr. *Lechmere*, who was counsel for the defendant. He agreed to the power of a secretary of state to commit for treason or felony ; and that the messenger was a proper officer. And in that case, the court held the warrant good and legal.

In the case of *Rex v. Earbury*, M. 7 G. 2. 1753, who was arrested and committed by warrant from a secretary of state ; and his papers seized, which he applied to have restored : Lord *Hardwicke* held that they could not be restored, in a summary way, on motion. The warrant there was " to search for the papers and to bring the author before the secretary of state."

The statute of 1 E. 3. enacts, " for the better keeping, " and maintenance of the peace, good men and lawful " shall in every county be assigned to keep the peace." So, 4 E. 3. c. 2.

The 18 E. 3. stat. 2. c. 2. is the first statute that gives the judicature of hearing and determining. 34 E. 3. [1754] c. 5. enlarges their powers. The 2 Ed. 5. c. 4. † calls † V. stat. 1. them by the express name of " justices of peace." c. 4. s. 2. and Their commission impowers them to keep the peace ; stat. 2. c. 1. and also contains a *distinct* clause " to hear and determine."

Therefore, the *old conservators* of the peace still remain : they have also power to hear and determine as justices, they are *wardens* of the peace too, by their commission, as well as by common law : and they may likewise by the common law, without any special commission or war-

1765:
MONEY:
et al.
v.
LEACH

1765.
MONEY
et al.
v.
LEACH.

rant, use force to suppress rebels. For which last assertion, he cited *Kelyng* 76.

The statute of 7 Jac. 1. c. 5. (about pleading the general issue,) means to protect *all* that act as conservators or wardens or justices of the peace, as well as those that act under special commissions.

The act of 2 Ph. & M. c. 18. (relating to corporation-justices) calls them "*commissioners* for the conservation of the peace." Justice of peace is not a strict technical name: they may be called *custodes pacis*. In 2 Rol. Abr. 95. title, *Justices de peace*, it is said, "that an indictment taken before them, naming them *custodes pacis*, and not "*justices of the peace* (as the statute names them) is a "good indictment: for, it is all one." It is not material *how* the appointment is made. The statutes mean to include *all* conservators of the peace: they may *all* now plead the general issue, and give the special matter in evidence. The act of 7 J. 1. c. 5. does not indeed extend to any justices sitting *in sessions*: it only extends to them in their *single jurisdiction*,

The statute of 11 H. 6. c. 6. "that suits and processes before justices of the peace shall not be discontinued by new commissioners," is no exception to this rule: neither is 2 H. 5. stat. 1. c. 4. § 2. "that justices of the peace of the quorum shall be resident in their shire; (except lords named in the commission, &c., &c.)"

Acts of parliament shall be taken with *latitude*, and extended to cases within the *same reason* and calling for the *same remedy*. *Plowd.* 36d. *Ld. Zouch's case*. *Co. Litt.* 24. b. 10 *Co.* 101. b. *Benefage's case*. *Plowd.* 147. *Iston v. Studd*. *Plowd.* 36. *Platt v. the Sheriffs of London*. *Bro. Parliament* 20. *Wentworth's Office of Executors* 67. *Sir T. Jones* 62. *Plummer v. Whitchcot*.

[1755] The rule about "several particulars of an inferior nature being enumerated, excluding those that are of a higher nature and not enumerated," will not hold here. This act is not done *as a higher officer*; but only *as a justice of peace*. The Bishop of *Norwich* being named extended to *all bishops*: so the warden of the *Fleet* being named, extends to all gaolers. In *Moore* 845. *Phelps v. Winchcombe*, it was resolved "that a deputy constable may by the equity of the statute of 7 J. 1. c. 5, plead the "general issue."

Persons acting for preservation of the public peace ought to be protected: and these old conservators of it are more reasonably intitled to protection, than other persons are.

Second point—If the special matter may be given in evidence, then the question will be "whether this matte

" given in evidence would, if it had been pleaded, amount to a justification."

It is objected, " that the warrant is not legal; and that it was ill executed."

Ist. As to the warrant itself—No such action has ever been brought upon these warrants, by persons apprehended by virtue of them: or, at least, there is none upon record.

It is said, " that this warrant is too extensive in the description of the person: and that it has been abused."

Answer—The power is not illegal: and the abuse of it is no objection to the warrant itself. Such warrants are agreeable to long practice and usage.

Whatever the present determination may be, in point of law, it will be in the breast of the legislature to set it right.

In the *Bewdley* case, reported 1 *Peere Williams* 207. (*Regina v. Ballivos, &c. of Bewdley*) a construction of an act of parliament contrary to the words of it was allowed, founded upon only seven years practice. In *Comberb. 342. The India Company v. Skinner*—where the warrant was granted before any default; *Holt* said, " that the practice having been, in case of taxes, to grant a conditional warrant to distrain, *communis error facit jus*."

The power of justices of peace " to commit before indictment," stands supported only by practice and usage. In 6 *Mod.* 178. *Regina v. Tracy*, *Holt* Ch. J. says, formerly, none " could be taken up for a misdemeanor, till indictment found: but now the practice all over England is otherwise." And *per Hale*, " that practice is become a law." So likewise has usage and practice established *ac-eclams, quo minus*, new trials, &c.

The greatest judges have bailed persons taken up upon these warrants; and they have not been objected to, by either courts, or counsel of the greatest eminence: whereas, if they were not legal; the persons apprehended upon them ought to have been discharged. For which he cited, 1 *Halt's Hist. P. C.* 578. The court will not make orders upon illegal warrants: consequently, they saw no objection to them: Even the greatest friends to the revolution have not objected to these warrants. From whence, it must be inferred, that no objection lies against them.

On 6 July 1641, in the case of Sir John Elliot, &c. The House of Commons resolved, that it was a breach of privilege: but they did not vote it illegal.

Lord Hardwicke, in *Egbury's* case, only said " he would not then determine it."

In treason, it will scarce be objected to; nor in felony

1765.
MONEY
et al?
v.
LEACH.

See 755.
1 P. W. 223.
1 Ves. & Beam.
71885 P. W. 6
His Practice

[1756]

1763.
MONEY
et al.
v.
LEACH

In *Miss Blandy's* case, her bureau was broken open; and her papers seized; and given in evidence.

Indecent prints or books may be seized by a magistrate: and they often have been so.

Evidence taken from felons or other criminals may be produced against them; though a criminal shall not be *compelled* to produce such evidence *against himself*.

It is said "that this warrant is illegal, because it is *general* to take up the author, printer, or publisher." But it is legal to issue and execute a warrant against a person unknown, but *only described*. Indeed the magistrate issues it, and the officer must execute it, at their *peril*. And though the warrant includes seizing the *papers*, yet *that part of it has not been executed*: and the bare insertion of it shall not affect the officer who executed the *other part of the warrant*.

[1757] The facts are these—A warrant was directed to four messengers: *Carrington*; one of them, is informed "that *Leach* was "the printer: and that the reputed author was "frequently at *Leach's* house." The other three act on this information. And this information was not groundless: for, they found a sheet of another number, wet and just printed. They take him up, and carry him to Lord *Halifax's* office; who was not then at leisure to examine him: but when he did examine him (four days after,) he discharged him. Here *was probable cause* for taking him up.

A justice of peace having jurisdiction, may grant a proper warrant on probable cause: and ministerial officers (constables, &c.) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honestly, and upon a probable cause.

[Third point—The plaintiff's action is sufficiently barred by 24 G. 2. c. 44. for want of observing the terms required by it. They neither proved *notice*, as the third section requires; nor made the *demand* required by the sixth section.

The defendants have acted in obedience to the warrant of a magistrate who is a justice of peace within the meaning of this act; and by his order; and in his aid.

The only doubt is, "whether the action is brought for any thing done in *obedience* to the warrant; or "not."

The defendants have obeyed it to the best of their power.

However, as they have acted *under colour* of the warrant, meaning to obey it, they are not answerable, although they may have erred in the execution of it. They are protected by this act, if they have acted *bona fide*; even though the warrants and the execution be il-

legal. They are not to judge of arduous points of law: the statute means to protect them from it.

2dly. The previous step to bringing this action was not taken; viz. the demanding a perusal and copy of the warrant, and shewing a refusal of it.

If there was a fault, or negligence, or mistake in this proceeding, the fault was in the magistrate: there was none in the officer who executed it. And the requisite steps have not been taken, in order to maintain the suits.

Therefore the plaintiff is barred of this action.

Mr. *Dunning*, contra—for Mr. *Leach*, the plaintiff [1758] below.

The first question is “whether this be a case with-
“in 24 G. 2. c. 44:” which question will involve the
question “whether it be within the acts of 7 J. 1. c. 5. or
“21 J. 1. c. 12.”

All these statutes, being in *pari materia*, must receive the same construction: and they are all unapplicable to the present case.

He then made three sub-divisions of his first question: viz.

1st. Whether Lord *Halifax*, being secretary of state, is a conservator or justice of peace within the true intent and meaning of the act of 24 G. 2. c. 44.

2dly. Whether the defendants are constables, head-boroughs, or officers, &c. within the intent and meaning of that act.

3dly. Whether this action be brought and properly pursued within the true intent and meaning of it; and for a matter done in obedience to the warrant.

First point—Lord *Halifax* is not a justice of peace within 24 G. 2. He is not so by commission: he is not so, as incident to his offices, either of secretary of state, or of privy counsellor.

But it has been said “he is a conservator of the peace;” and therefore within the meaning of the act.”

I deny the principle, and also the conclusion. I admit the case of *Rex v. Kendal and Ræ*; though the reasons of it do not appear; but I submit to the authority of it, that “a secretary of state has a power to commit for high treason.”

Serjeant *Hawkins*’s reasons do not support his assertion: and I deny that a secretary of state is a conservator of the peace. He has only a power of committing for high treason, as conservators of the peace had in other cases: and *Kendal* and *Ræ*’s case carries it no further. The court never meant to resolve any thing further.

All the crown-writers are silent on this subject of a secretary of state’s having this jurisdiction. None of them

1765.

MONEY
ETAL’

V.

LEACH.

1765:

MONEY
et al.

v.

LEACH.

* V. Lib. 1.

c. 9.

† Lib. 2. c. 8.

s. 2.

even hint that a secretary of state is a *conservator of the peace*. Staundford, Fitz-Herbert, Lambard, &c. say no such thing.

* Lambard gives the list of those officers who are conservators of the peace: but there is no mention therein, of secretaries of state. Serjeant † Hawkins copies the same list, *without adding* secretaries of state.

There is no proof or pretence that the conservatorship of the peace is *incident to their office*: nor is there any usage, to support such a notion. Their claim of a power to grant such warrants as the present one is not pretended to be older than the *revolution*.

If they were justices of the peace or conservators of the peace, they would be *bound* to execute the powers given to justices, or residing in constables; and they would be subject to the control of this court.

The offices are different in creation, constitution; and execution.

The very language of the warrant shews that the secretary of state did *not* consider himself as a justice, conservator, or constable.

This statute is *not to be extended* beyond the letter of it: it is not within the maxims or reasons of extension of acts of parliament.

It is necessary to consider the former statutes of 7 J. 1. c. 5. and 21 J. 1. c. 12: (both of which he rehearsed and observed upon.)

In these, there is no mention of secretaries of state: nor is there any reason to add others not there enumerated; the rather, as the enumeration begins with persons inferior to secretaries of state. Neither is there any ground to imagine that the legislature *intended* to include secretaries of state within their provision: the preamble shews rather the contrary. The line drawn between those enumerated and those omitted, shews the same thing. The persons intended to be protected, are persons *bound* to act, and acting for the public good, *without reward*; not great officers with great salaries, who are not lawyers and are not bound to act.

[1760] The persons introduced by the second act (church wardens, sworn-men, overseers, &c.) are persons within the mischief of the former: yet even *they* were *not virtually* included in the former, and are therefore particularly named in the latter.

This latter explanatory act omits, nevertheless, to name secretaries of state. But constables are within the letter; and it extends to no others. And he referred to 4 Inst. 174, and the two marginal notes there; one on 7 J. c. 5: and the other, on 21 J. c. 12.

From all which premises he argued that these acts of

Jac. 1. are not to be extended beyond the letter: and if they were, yet there is no reason to extend them to secretaries of state, as *not being* within the same inconvenience.

No more reason is there to extend that of 24 G. 2. c. 44. If the legislature had so intended, they would *not have* confined it to *justices of the peace*, a species of magistrates well known and understood in our law.

So much for the noble *lord*.

As to the MESSENGERS—*They* do not fall within the *Secondly*. words or meaning of the act of 7 J. 1. c. 5. Which is confined to *officers*, who are persons known in our law, and *bound* to execute the warrant of a justice of peace; an office of burthen, not of profit; and incapable to distinguish the precise limits of a jurisdiction.

This is in no respect the case of *the king's messengers* in ordinary; who are persons *unknown* in our law, and *mere volunteers* in executing warrants of justices.

The words "*other officers, &c.*" mean *borougholders, &c.* officers of the *same* sort as constables and tythingmen: *not* king's messengers: *these* persons can not be considered as aiding and assisting the constables. The warrant and the fact are quite the reverse: the constables are directed to assist *them*. They do not act under the command of a justice of peace, or in his assistance.

This warrant is not under the hand and seal of a justice of peace. Therefore the act does *not* protect the defendants.

Nor is the act done IN OBEDIENCE to *this warrant*. The warrant was "to apprehend the author, printer, or publisher:" but they have executed it upon a person who was *not* the author, printer, or publisher. Consequently, as they have not acted *under* it, they can not be protected *by* it.

It is said, "that a *description* is equivalent to naming the persons; and that here is a sufficient description."

But the description of an *offence* is no description of the person *offending*: and this is only a description of the *offence*.

The *obedience to the warrant* is the condition of the protection which the act gives to the officer. Therefore, the condition failing, the protection does not take place. [2 Wils. 280. post. 1766]

Here is no *probable cause*, nor any reason for justifying the officer *under a probable cause*. It is not like the cases of apprehending *traitors* or *felons*. Here is only information from one of their own body, "that the author of the paper had been seen going into *Leach's* house, and that *Leach* was the printer of the composition *in general*:" not of this particular paper.

But though neither this *hearsay* information was in it

1765.
MONEY
et al.
v.
LEACH.

[1761]
Thirdly.

1765.

MONEY
et al.'

v.

LEACH.

*Or Dawson
qu.

[3 Wils. 317.]

self *true*; nor would the consequence follow, if it had been true; yet they thereupon arrest and imprison an *innocent* man. 'I therefore *these* men themselves are to answer for doing this: *not* the person who *issued* the warrant. The warrant did not command nor authorize them to do what they have done. It is necessary for them to shew an acting *in obedience to the warrant*: otherwise they are *not* within the protection of the act. In proof of which, he cited two cases; one, by the name of **Larson v. Clark*; and the other, a *Norwich*-case, where a bailiff had executed the warrant out of the proper jurisdiction. (V. post 1816.)

Upon these authorities, upon the reason of the thing, and upon the words of the act, the officer is *not* intitled to the protection of the act; nor needs the justice be made a party, but where the officer acts *in obedience* to the warrant: acting *under colour* of it only, is not sufficient.

[1762] Besides, the party apprehended was *not carried before* Lord *Halifax*, or *dealt with* according to law. Surely, *this* was the act of the officer; not of the person who signed the warrant. And *no reason* is given, stated, pretended, or even existed, *why* this matter was so transacted. Therefore there was *no* probable cause or reason whereupon to ground a justification of this their conduct.

So that even allowing the secretary of state to be a justice of peace, and the officers to be constables; yet the action lies against the plaintiffs in error, who have acted in this unjustifiable manner.

It appears therefore, that even *if* they had had a defence upon the *merits*, they have *not properly pleaded it*. However, in fact they had *no* defence upon the *merits*: the plaintiff *Leach* was neither author, printer, nor publisher of the paper; nor at all within the description of the warrant.

BUT the WARRANT itself is *illegal*. It is against the author, printer, and publisher of the paper, *generally*, without naming or describing them; and not founded on any charge upon oath: it is also, "to seize his papers;" that is, *all* his papers.

No *justice of peace* has power to issue *such* a warrant. Therefore Lord *Halifax* could not do it *as a justice of peace*. Nor is there any pretence of *usage* to support such a claim of doing it *as secretary of state*, further back than the *revolution*.

It lies upon *them*, to *prove* their claim, and to *shew* their authority.

The PRACTICE of a *particular magistrate* cannot controul the LAW. *Communis error* is not, in *this* case, sufficient to make law. It is the duty, and it is therefore,

doubtless, the *inclination* of the court, to stop the mischief, as soon as it is complained of to them.

IF "*author, printer, and publisher,*" without naming any particular person, be sufficient in such a warrant as this is, it would be equally so, to issue a warrant generally, "to take up *the robber* or murderer of such a one." This is no description of the *person*; but only of the *offence*: it is making the *officer* to be judge of the matter, in the place of the person who *issues* the warrant. Such a power would be extremely mischievous, and might be productive of great oppression.

To ransack private studies in order to *search* for evidence, and even *without* a previous charge on oath, is contrary to *natural justice*, as well as to the liberty of the subject: and it is as *useless* as it is cruel, in the case of *libels*; because it is the *publication* only that makes the *crime* of a libel.

To search a man's private papers *ad libitum*, and even *without accusation*, is an infringement of the natural rights of mankind. And *this* is a warrant "to seize *ALL* a man's *papers,*" without any particular relation even to the crime they would *suppose* him chargeable with.

No case of this sort has ever undergone *judicial* discussion and determination. And as the court does not interpose in cases not objected to, no arguments can be drawn from such as passed *sub silentio*, or were never *objected to*.

All the writers upon the crown-law say, "that there must be an *accusation*; that the person to be apprehended must be *named*; and that the officer is *not* to be left "to arrest who *he thinks fit*." For which, he vouched *Hale's Hist. P. C.* 1st part, page 580 and 586. and *Hawkins's P. C.* book 2. c. 13. § 10. pages 81 and 82.

Here, it is left to the *officer*, to take up any person whom *he himself* suspects.

Lord Ch. J. *Scroggs* was *impeached* for issuing such warrants as this is.

Therefore he prayed judgment for the defendant in error.

Mr. Solicitor General *De Grey*, in reply, on behalf of the plaintiffs in error.

A SECRETARY OF STATE is an *officer by prescription*; and his office must be as *ancient* as the office of the person to whom he is secretary: for, he is and always has been an officer *necessary* to the crown; and the constitution always required the support of this office. And as his power to commit for *treason* depends upon *prescriptive right* and the *nature of his office*; so likewise it does in *all* cases of preserving the *public peace*.

In the case of *Kendal* and *Roe*, the power, in *treason*,
VOL. III. I i

1765.

MONEY
et al.'

v.

LEACH.

[1763]

1765.

MONFY

et al.

v.

LEACH.

[1764]

was acknowledged. In *Darby's* case, it was recognized, in *felony*. In *Earbury's* case, (where the warrant was general, as this is,) he was *continued* on his recognizance. A secretary of state has these powers, upon the foundation of *prescription*; not on our law-books: and he has, equally, the *power* in him: whether he does or does not exert it in *low* and *common* instances. I suppose he is *as compellable* to act, as a *conservator* of the peace formerly was, *before* the acts of parliament which give power to *justices* of peace.

CHARTER-justices can scarce be called *commission-justices*: and yet these statutes extend to them.

A "JUSTICE of the peace," means a *conservator*, a *warden* of the peace. Therefore there was no need to NAME *secretaries of state*, in the acts of parliament: they were included, *without* naming them particularly.

The marginal note in Lord Coke is no authority. However these officers *are* named in the text, "and certain" "others his majesty's officers."

This action is brought for what was done in obedience to the warrant; which the officer was *obliged* to execute, in the best manner he could.

If there is any fault, it is in the *magistrate*: he should have described the offender with greater certainty. If the executing officer acts to the *best of his ability*; he is justified, and acts *in obedience* to his warrant.

Here the officers *did so*: they were reasonably satisfied, "that *Leach* was the printer." And on search, this *probable* cause was *increased* to a higher degree: for, they found another fresh sheet of the *same* work, just printed off, and wet. They detained him *on occasion* of his being to be carried before Lord *Halifax*, to be examined. The officers had nothing to do with his examination: *that* was the affair of Lord *Halifax*; and if he discharged the persons apprehended and brought before him *without* examination, it was the better for them.

In *Vaughan* 111. *Stiles v. Sir Richard Coxe and others* — it was determined, that the defendants should have the benefit of the act; because they acted by *colour* of the warrant.

As to the WARRANT itself—it is objected, "that there is *no charge* upon oath." But there was no occasion, he said, for it: and to that purpose, he cited the *Queen v. Darby* (v. *Fortescue* 141.) *Rex v. Earbury*, Mich. 7 G. 2. and 1 *Hale* H. P. C. 582. where it is laid down, that "it is convenient, though *not always necessary* to take an information upon oath of the person that desires the warrant."

It is objected "that this warrant is *not authorized by any length of usage*."

But the usage, as here stated, is *sufficient*: and it must be taken to be coeval with the office. The bill of exceptions indeed only takes it up from the *revolution*; asserting that it has been so ever since *that* time: but the *facts* go up to the restoration; and none of a *different* form were produced, prior to the revolution.

1765.
MONEY
et al.
v.
LEACH.

As to *seizing papers*—It is difficult indeed to draw the exact line. But is certainly necessary, in *some* degree: and no instance is produced, of such warrants having ever been *abused* as instruments of oppression.

He concluded, upon the whole, that the plaintiff had no right to bring his action.

Lord MANSFIELD—I suppose, this is intended to be argued again. However, I will say something, at present, upon it.

A bill of exceptions supposes the evidence *true*; and questions the *competency* or *propriety* of it.

“Whether there was a *probable cause* or, ground of “suspicion,” was a matter for the *jury* to determine: *that* is not *now* before the court. So—“whether the defendants “detained the plaintiff an *unreasonable* time.”

But if it had been found to have been a reasonable time; yet it would be no justification to the defendants; because it is stated “that *this* man was neither author, “printer, or publisher:” and *if* he was *not*, then they have taken up a man who was *not* the subject of the warrant.

The three material questions are—1st. “Whether a *secretary of state* acting as a conservator of the peace by “the *common law*, is to be construed *within the statutes* of “*James the First*, and of the late king.” 1st Question.

The protection of the officers, *if* they have acted in obedience to the warrant, is *consequential*, in case a secretary of state *is* within these statutes.

As to the arrest being made *in obedience* to the warrant, 2d Question. or only under *colour* of it and without authority from it—

This question depends upon the *construction* of the warrant; whether it must not be construed to mean “*such* [1765] “persons as are under a *violent suspicion* of being guilty “of the charge;” (for they cannot be *conclusively* considered as guilty, till *after trial and conviction*.) The warrant itself imports only *suspicion*; for, it says,—“to be “brought before me, and examined, and dealt with according to law:” and this suspicion must eventually depend upon *future* trial. Therefore the warrant does not seem to me, to mean *conclusive* guilt; but only *violent suspicion*. If the person apprehended should be tried and *acquitted*, it would shew “that he was not guilty:” yet *there might* be a sufficient cause of suspicion.

Mr. Dunning says, very rightly, that “to bring a per- [Ante, 1761]

1765.

MONEY
et al.

v.

LEACH.

Sd Question.

"son within 24 G. 2. The act must be done in *obedience* to the warrant."

The last point is, "whether this *general* warrant be *good*."—

One part of it may be laid out of the case: for, as to what relates to the *seizing his papers*, that part of it was *never executed*; and therefore it is out of the case.

It is not material to determine, "whether the warrant be good or bad;" except in the event of the case being *within 7 J. 1. but not within 24 G. 2.*

At present—As to the validity of the warrant, upon the single objection of the *incertainty of the person*, being *neither named nor described*—The *common law*, in many cases, gives authority to arrest *without warrant*; more especially, where taken in the very act: and there are many cases where particular *acts of parliament* have given authority to apprehend, under general warrants; as in the case of writs of assistance, or warrants to take up loose, idle and disorderly people. But here it is not contended, that the *common law* gave the officer authority to apprehend; nor that there is any *act of parliament* which warrants *this* case.

Therefore it must stand upon *principles of common law*.

It is not fit, that the receiving or judging of the information should be left to the discretion of the *officer*. The *magistrate* ought to judge; and should *give certain directions* to the officer. This is so, upon reason and convenience.

[1767] Then as to *authorities*—*Hale* and all others hold such an uncertain warrant *void*: and there is *no* case or book to the contrary.

It is said, "that the *USAGE* has been so; and that many such *have been* issued, since the revolution, down to this time."

But a *usage*, to grow into law, ought to be a *general* usage, *communiter usitata et approbata*; and which, after a long continuance, it would be mischievous to overturn.

This is only the *usage* of a *particular office*, and *contrary* to the usage of all *other* justices and conservators of the peace.

There is the *less* reason for regarding this usage; because the form of the warrant probably took its rise from a positive statute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Justice WILMOT declared, that he had no doubt, nor ever had, upon these warrants: he thought them *illegal* and *void*.

Neither had the two other judges, Mr. Justice YATES, and Mr. Justice ASTON, any doubt (upon this first argument) of the *illegality* of them: for, no degree of antiquity

adhibitis
in vinctis, hactenus temporibus
in vinctis, hactenus temporibus
in vinctis, hactenus temporibus
Publ. 2202 Am. on 10th 11-11

can give sanction to a usage *bad in itself*. And they² esteemed this usage to be so. They were clear and unanimous in opinion "that this warrant was illegal" and *bad*."

1765.
MONEY
et al.

v.
LEACH.

Lord MANSFIELD—Let it stand over, for further argument.

The case standing in the paper, on *Friday* 5th Nov. 1765, for further argument---

Mr. *Yorke*, Attorney General, was now to have argued on behalf of the plaintiffs in error; and begun to enter into his argument: but when he came to mention the two cases cited by Mr. *Dunning*, both of which were determined before Lord Mansfield, upon 24 G. 2. c. 44. One of them at *Norwich*, summer assizes, 1761; (where damages were given;) the other * of them, on a warrant under the vagrant act of 17 G. 2. (where his lordship held "that the defendant ought to shew that the officer had acted in obedience to the warrant;" and he did so;) he seemed to intimate that this objection "of their not having done so, in the present case," was too great a difficulty for him to encounter; and therefore rested the matter where it was, without proceeding any further in his argument.

* Dawson or
Lawson v.
Clarke.
V. ante,
p 1761.
[See also
2 Bosan. 160.]
[1768]

Lord MANSFIELD remembered both these cases; and said, he still continued of the same opinion.

Where the justice can not be liable, the officer is not within the protection of the act. The case in *Middlesex* concludes exactly to the present case. For, here the warrant is to take up the *author, printer, or publisher*; but they took up a person who was *neither author, printer, nor publisher*: so, that case was a warrant "to take up a disorderly woman:" and the defendant took up a woman who was not so.

5 Last 233-
2 Cl & F 259

And he held the same opinion now, he said, as he did before, in the case at *Norwich*.

This makes an end of the present case: for, this is a *previous* question; and the *foundation* of the defence fails.

The consequence is, that the judgment must be affirmed.

The other judges assenting,

The RULE of the COURT was

"that the judgment be affirmed."

JUDGMENT AFFIRMED.

BULBROOK *versus* SIR ROBERT GOODERE and others. [S C. 1 BL 559.]

THIS was a demurrer to an action of trespass for breaking and entering the plaintiff's close called the river *Thames*; and taking up, breaking and destroying his bucks there erected and placed for the catching of fish; and taking his fish out of the bucks, and carrying them away, and converting them to their own use.

Water bailiff
of the river
Thames cannot
justify seizing
nets in a
private
fishery.

1765. The defendants, in their plea, alledge, that the close in
 BULBROOK question is part of the river *Thames*, and lies between
 v. *Staines* bridge, and the head of the river; and that the
 GOODERE, conservacy of that part of the river is in the crown.
 and others. Then they alledge that the office of water-bailiff is in the
 gift of the crown. Then they set forth the statute of 1 *Eliz.*

[1769] c. 17. which prohibits the taking of fish but only with the
 particular nets or tramels therein specified, under forfeiture
 of a pecuniary sum, and of the fish so taken, and also of the
 unlawful engines. (a) Then they shew a grant from the
 crown to two of them, of the office of water-bailiff, be-
 tween *Staines* bridge and the head of the river. They
 alledge that these bucks were engines for catching of fish,
 other than the nets and tramels allowed by the said act of
 parliament; and were *unlawful* engines; and were wrong-
 fully and unjustly erected there: and therefore they jus-
 tify the taking up the bucks and throwing the fish into
 the river; two of them, as water-bailiff; and the other
 two, as their servants and by their command. (b)

The plaintiff in his replication admits the conservacy
 to be in the crown: and that the office of water-bailiff is
 in the gift of the crown; and admits the act of 1 *Eliz.*
 c. 17. as stated in the plea; and admits the grant to Sir
Robert Goodere and others: but *protesting* that the bucks
 which were taken away by the defendants, were not un-
 lawful engines: for replication, he says, and insists, that
 all offences done and committed by unlawful fishings in
 the said river *Thames*, by the laws and statutes of this
 realm ought to have been and ought to be in due and
 legal manner *presented*, or *information* concerning such
 offences ought in due and legal manner to be made at a
 court of conservacy, or other court having sufficient and
 competent authority in that behalf; and *there* ought to
 have been and ought to be discussed, tried and deter-
 mined, according to the laws and statutes of this realm.
 Then he avers, that *no* information, presentation, conviction,
 or adjudication whatsoever had ever been made before
 the committing this trespass, at any court of conservacy,
 or other court concerning the said offence in the plea men-
 tioned. He concludes therefore, that the defendants com-
 mitted the trespass in their own wrong; and prays judg-
 ment against them.

(a) Qu. If the defendant was not intitled to judgment
 by the 5th section of the stat. referred to?

(b) The defendants seem to have been justified in what
 they did, if they had pleaded the stat. 30 G. 2. c. 21. s. 5.
 (in note (d) *infra*) and had brought the case within that
 stat.; which, if they acted properly, they might have
 done. Vid. the above sect. of the act.

The defendants demur generally. To which there is a joinder in demurrer.

Mr. *Walker* argued for the defendants.

There is no one *fact* suggested, but a matter of *law*; nothing that we could *take issue* upon.

The only fact alledged in our justification, and not admitted by the replication, is denied by *protestation* only.

If we had rejoined, we could only deny *facts* suggested: we could not meddle with matter of law. Here they only suggest matter of law; *viz.* "that it *ought* to have been presented." We could not, by a rejoinder, take *issue* upon that matter of law.

Lord MANSFIELD—The point lies in a nutshell: the only question is "whether they could seize the nets *before* conviction."

Mr. *Walker*—We do not claim the *forfeitures*: we only set up this that we have pleaded, as a defence or *excuse for the trespass*.

We have a right, as water-bailiff, to stop and prevent an illegal *nuisance* contrary to the act of parliament; and to *remove and abate* this private nuisance: (though we have a right *also* to proceed subsequently for the penalty; which we have not yet done.)

And he cited several cases, to prove that the party injured may remove a nuisance. *F. N. B.* 184, 185. 1 *Ro. Abr.* 661. Title *Distress*. Sir *William Jones* 221. *James v. Hayward*. *Cro. Car.* 228. *Reynell v. Chambernoon*. 5 *Co.* 2 Part 101. *Penruddock's Case*. 9 *Co.* 57. *William Aldred's Case*. 2 *Salk.* 438. *Rex & Regina v. Wilcox*. And 3 *Bulst.* 197. *Morrice v. Baker et Ur.*

Where the injury is *increasing*, the party injured may *stop* it; whether the nuisance be *public* or *private*: and in *private* nuisances, he may have an action also for the injury already sustained. And this reasoning is applicable to the present case.

N. B. The *replication* was admitted to be *bad*. But see the 6th, 7th, 8th, 9th, 10th and 11th sections of this act: where power is given "to inquire concerning offences against it, by the oaths of twelve men;" and presentments and convictions are mentioned expressly.

Mr. ASHURST was to have argued for the plaintiff: but, it was not thought necessary.

Lord MANSFIELD—An offence is here *created* by an act of parliament. If you take advantage of this act, you must pursue the method prescribed by it. This is the plaintiff's *own* fishery: and he might have done what he would in it, before this prohibition in the act of parliament.(c)

(c) This is a mistake, as appears by the stat. 13 Ric. 2 stat. 1. c. 19. However, it seems that there should have been

1765.

BULBROOK

v.

GOODERE,
and others.

[1770]

1765.

BULBROOK

v.

GOODERE,
and others.

[1771]

[Vide Postleth.
Dic. tit.
Fishery.]

Mr. Justice WILMOT concurred. This is not to be considered as a *nuisance*, either public or private. The violation of this public law is not within the idea of a *nuisance*.

Mr. Justice YATES concurred. This was the plaintiff's *own* fishery: and the defendants have taken up the bucks, and taken the fish. This laying the bucks was *no nuisance*: and no power is given by the act, "to seize." The defendants are not to be their own judges. They ought to have followed the method prescribed by the act. The water-bailiff had no right to take the nets of the person fishing in his *own* fishery. (d)

Mr. Justice ASTON declared his assent, to the same effects

Whereupon, *per cur.*

JUDGMENT for the PLAINTIFF.

Saturday, 9th
Nov. 1765.

If it be discovered that the witnesses were suborned, a new trial will be granted.

FABRILIUS *versus* COCK.

THIS was an action of trover for 6000 pagodas, of the value of eight shillings each, or 2400l. sterling; in which a verdict had been given for the plaintiff, for 2400l. at *nisi prius* in *Middlesex*, before Lord Mansfield.

On Friday 25th of January last, Mr. Serjeant Davy, on behalf of the defendant, moved for a *new trial*.

The plaintiff was a *Dane*: and the case he made at the trial, was "that he had escaped from a *Danish settlement* in the *East Indies*, with 6000 pagodas *quilted* about his body." (He was present in court; walked to and fro, with great agility; and then shewed he had 6000 pieces of lead, of the size of pagodas, concealed and fastened about his body.) That he came aboard one of our *East India* ships; of which, the defendant was mate: and that he had deposited these pagodas with him.

a conviction; for in the stat. *Westminster* 2. c. 47. made on the same subject (though not extending to the *Thames*) for the first offence inflicts a punishment of burning the nets; and Lord Coke in 2 *Inst.* 479. observes that it ought to be by indictment.

(d) By the stat. 30 G. 2. c. 2. s. 5. the water bailiff hath an authority "to seize unsizeable or unseasonable fish, "and unlawful nets, engines, and instruments;" but then he ought by that statute to bring them before a proper magistrate, and proceed as thereby directed.

But that relates only to the water bailiff within the jurisdiction of the lord mayor of *London*, which extends no higher than to *Staines*: whereas the present action was for a trespass higher up, and the conservancy there was in the crown, by whom the defendants were appointed; but how far the power of such officers extends does not appear by this case.

Some *Danish* sailors, who were aboard, swore to circumstances which proved his having the pagodas and putting them into the defendant's hands. Great stress was laid upon the confusion the defendant appeared to be in, when the money was demanded of him. A witness, who called himself a *Danish* consul, swore to circumstances in support of the plaintiff's case.

1765.
FABRILIUS
v.
COCK.

The defendant always denied the whole story; but was not able to contradict the proof at the trial. So the jury, to the satisfaction of Lord Mansfield, found a verdict for the plaintiff for 2400l: the value of the pagodas.

The defendant moved for a new trial, upon the ground, [1772]
" that the whole was a fiction, supported by perjury, which he could not be prepared to answer. That since the trial, many circumstances had been discovered, to detect the iniquity, and to shew the subornation of the witnesses."

THE COURT, after a very strict scrutiny, on Monday the 11th February last, granted a new trial on payment of costs.

The justice and propriety of this determination, appeared in a very strong light to many persons: who thought the whole story to be manifestly a scheme of villainy, supported by perjury. And the plaintiff never dared to try it again.

And now (this 9th of November 1765) on Mr. Davenport's motion, the plaintiff not having proceeded, a rule was made for

JUDGMENT as in case of a NONSUIT.

LEITH *versus* MAC FERLEN.

IT was agreed by court and counsel, that a writ of error could not be *non-pros'd*, without a RULE "to assign errors."

Saturday, 16th
Nov. 1765.

Rule to assign errors,
[See 2 Durn.
18.]

JOHNSON *versus* JEBB.

WHERE a plaintiff brings a writ of error to reverse his own judgment, (which is nothing strange or unreasonable where it is given for a less sum than he has a right to demand,) the common method of bringing a *scire facias quare executionem non*, or a *scire facias ad audiendum errores*, would be improper. Therefore, if the plaintiff in error will not proceed, this court may and ought to make a rule to oblige him to assign errors within a limited time.

Plaintiff may bring error to reverse his own judgment.
[See 2 Durn.
17, 18.]

Accordingly—

THE COURT made a rule upon the plaintiff in error, to assign error within four days; or else that his writ of error should be *non-pros'd*.

1765. N. B. This case arose upon the *late* practice of the court of *Common Pleas* about *paying money into court*; which *used* to differ from the practice of *this court*, (who order so much as is paid in by the defendant to be *struck out* of the declaration: whereas, in *C. B.* they did *not* use to strike it out, but the plaintiff took judgment at all events;) which *late practice*, Sir *Fletcher Norton* said, *that court* had, very recently altered, from the inconvenience they had perceived in it, (particularly in the present cause,) and had made their practice conformable to the practice of *this court*.

[1773]

It was an action in *C. B.* brought upon a policy of insurance; and the defendant had paid in a sum of money into that court.

Saturday, 16th
Nov. 1765.
[S. C. 1 Bl.
407. 422. 454.
Bull. 264.]

It may be
presumed
when the wit-
nesses only
saw the last
sheet of the
will that the
whole was in
the room.
[See 9 Mod.
263. 2 P. Wms.
510. 3 P. Wms.
254 Comyns,
383.]

BOND and his WIFE *versus* SEAWELL and his WIFE.

THIS was a case reserved at *nisi prius* at *Guildhall*, before Lord *Mansfield*: and the question was upon the due execution of the will of Sir *Thomas Chitty*.

This will, or paper purporting to be a will, bore date on 20th *March* 1762: and the cause was tried at the sittings after *Hilary* term, 1765.

It was proved, "that Sir *Thomas Chitty* made his will, "consisting of *two sheets* of paper, all of his own hand-
"writing; and signed his name at the bottom of each
"page: and he also made a codicil, of his own hand-
"writing, upon one single sheet. He called in one
"Francis *Harding*; shewed him *both* the sheets of his
"will, and his signature to every page thereof; and told
"him *that was his will*. He also shewed him the
"codicil; and desired him to attest both the will and
"codicil: which he did, in the presence of the testator
"and in the manner appearing upon the face of the in-
"struments; and then went out of the room. *John*
"Vaughan and *John Leyland* came in immediately af-
"terwards. The testator shewed them the codicil and
"the *LAST sheet of the will*; and sealed both, before
"them; he took each of them up, and delivered them
"severally as his act and deed, for the purposes therein
"mentioned. These witnesses attested the same, in the
"testator's presence: *but NEVER SAW the FIRST sheet of*
"the will; nor was *THAT sheet PRODUCED to them*; nor
"was the same, or any other paper UPON THE TABLE;
"both the sheets of the will were found *with the codicil*,
"in the testator's bureau, after his death, all wrapped
"up in one piece of paper; but the two sheets of the
"will were *not pinned together*."

[1774]

On the trial, it was agreed that a verdict should be given for the plaintiff, subject to the opinion of the court; and in case the court should be of opinion that the said will was *duly* executed according to the

"statute for the prevention of frauds and perjuries," then the verdict should *stand*: but in case the court should be of opinion "that the said will was *not* duly executed according to the said statute for the prevention of frauds and perjuries," then a verdict should be entered *for the defendants*.

1765.
BOND
v.
SEAWELL.

There were three arguments upon this case: the first, on *Friday* 6th *May* 1763, by Mr. *Morton* for the plaintiffs, and Mr. *Yates* for the defendants; the second, on *Friday* 10th *June* 1763, by Serjeant *Hewitt* for the plaintiffs, and Mr. *Thurlow* for the defendants; the third, on *Tuesday* 31st *January* 1764, by Mr. *Willes* for the plaintiffs, and Mr. *Norton* (Attorney General) for the defendants: and it stood for the opinion of the court.

But there being some difference upon the case as stated, it was thought proper to have it argued before all the judges in the Exchequer-chamber: which argument I did not hear, and therefore cannot report.

Lord MANSFIELD now (on this 16th *November*, 1765,) acquainted the bar that there had been a conference on the preceding evening, amongst all the judges except Mr. Baron *Adams* (who was out of town,) upon this case: which was an amicable suit, he said, to try the real merits of the question: and it was agreed by the parties, "that if either side desired it, the case should be turned into the form of a *special verdict*."

It occurred to the judges, that the way in which the parties have put the case, does *not* go to the *whole* merits: because, if the first sheet was in the room at the time when the latter sheet was executed and attested, there would remain *no doubt* of its being a *good* will and a *good* attestation of the *whole* will: but if the first sheet was *not* then in the room, a doubt might arise whether it [Comyns, 393.] "was or was not a good attestation, as to the *real estate*."

However, *no opinion* was given or formed by the judges, [Bull. 264.] upon such *doubt* which might so arise, if it should appear "that in fact the first sheet was not then in the room."

His lordship observed, that the first sheet stopped or ended in the *middle* of a sentence. In the *last* sheet, the *devise of the land* was contained; and charges upon his lands were also contained it. [1775]

A will properly attested may, (he said) by *reference* to another instrument, establish particular clauses so ascertained by a clear reference, as strongly as if the clauses so referred to had been repeated in the will *verbatim*; (for which he cited the case of *Acherley* and *Vernon*.) And here are references, in this will, from one part to another: in the first sheet, the testator gives the trust of lands which were to be *after-mentioned*. In the last sheet, he appoints persons *trustees* of his will, who are *not* his executors, and therefore must be devisees

* M. 10 G. 1.
Vide Comyns
Rep. 381.

1765.
BOND
v.
SEAWELL.

of his land: he also calls them "trustees of his will, "upon the several trusts therein mentioned." (a)

But the question made at the trial, and submitted by the case, as it now stands, turns only upon the SOLEMNITY of the EXECUTION; not at all upon the *intent* of the testator. And we are of opinion, "that the *due* "execution of this will cannot be come at, in the method wherein the matter is now put."

If this be considered as a special verdict, we think it is defectively found, as to the point of the *legal execution* of the will.

Every *presumption* ought to be made by a jury, *in favour* of such a will, when there is no doubt of the testator's intention.

It is not necessary, that the witnesses should attest in the presence of each other; or, that the testator should declare the instrument he executed "to be his will;" or, that the witnesses should attest every page,

(a) N. B. Where a will is revoked it is no will; and therefore the same ceremonies are necessary to revive it as are necessary to make a new will: now to make a new will of real estate, it is necessary, by the statute of frauds, not only that it should be signed by the testator in the presence of three witnesses, but also that the three witnesses should subscribe their names as witnesses thereto, in the presence of the testator: consequently, when a will of real estate is revoked, it is necessary that a codicil which revives it, must not only be attested by three witnesses who saw the testator sign the codicil, but also that the testator should see or might see the witnesses to the codicil subscribe their names as witnesses thereto; now when the codicil is, at the time of the execution of the codicil, indorsed on or annexed to the will, if the testator see the witnesses attest the execution of the codicil, they must necessarily see the will, and therefore their attestation of the codicil goes to the attestation of the will, the codicil and the will being but one will; and consequently, the testator's seeing the witnesses to the codicil attest the execution, does in effect see them execute the whole will, as much as if the will and codicil had been all upon one paper; but if the codicil be neither annexed to nor indorsed on the will, the witnesses to the codicil, can be witnesses only to the execution of that, and not of that and the will, unless the will be shewed to them at the time they execute the codicil. N. B. This seems to account for the reason why many cases make the indorsement of the codicil on the will, or the annexation to the will as a material circumstance, as well as the number of witnesses to the codicil, in all questions about republication of wills of real estate by codicil.

folio, or sheet; or, that they should know the contents; or, that each folio, page or sheet should be particularly shewn to them.

This has been settled.

But the fact "whether the *first sheet* of his will was or "was not *in the room*, at the time of executing and at- [3 Mod. 263.]
"testing the latter," may be *material* to be known. *If* it *was*, the jury ought to find for the will, generally; and they ought to find all things *favourable* to the will. *If* it be doubtful "whether the first sheet was then in the "room or not;" we all think the circumstances sufficient to *presume* "that it was in the room;" and "that the jury "ought to be so directed."

But, upon a *special* verdict, nothing can be *presumed*.

Therefore we are all of opinion, that it ought to be [1776]
tried "over again." And *if* the jury shall be of opinion, that it "*was* then in the room," they ought to find for the will, generally: and they ought to *presume*, from the circumstances proved, "that the will *was* in the "room."

A NEW TRIAL WAS ORDERED.

LAVIS and Another, Assignees of JANE Cox, a Bankrupt, Tuesday, 19th
versus PHILLIPS and Others, Assignees of JOHN Cox, Nov. 1765.
a Bankrupt. [S. C. 1 Black.
570.]

THIS was a case reserved upon a trial at *nisi prius*, A wife
before Lord Mansfield at Guildhall, at the sittings sole trader in
after Trinity term, 1765, in an action of trover, brought London
by the assignees of Jane Cox, a sole trader in London, is liable
and a bankrupt; against the assignees of John Cox, her husband, to a commis-
sion of bank-
ruptcy,

The action was brought in order to try whether the plaintiffs had a right, as assignees of Jane, to certain goods in the millinery trade carried on by her after her marriage: which goods had been seized by the persons acting under the commission issued against John Cox, her husband.

It was tried by a special jury: and a verdict was given for the plaintiffs; subject to the opinion of this court, [See 7 Vin. 56.
2 Bosanq. 95,
102.]
upon the following facts and custom, then and there stated and agreed: *viz.*

1st. The commission of bankruptcy issued against John Cox the husband, on the 13th of March, 1764: and the commission against Jane his wife, on the 26th April, 1764.

2d. The CUSTOM OF LONDON, taken and translated from *Liber Albus* in the town-clerk's office, is as follows—
"Where a *feme*, covert of her husband, useth any
"craft in the said city on her *sole account*; whereof the
"husband meddleth nothing: *such a woman* shall be

1765. "charged as a *feme sole*, concerning every thing that
 LAVIE "toucheth the craft: and if the husband and wife shall
 and another "be impleaded, in such case the wife shall plead as a
 v. "feme sole; and if she is condemned, she shall be com-
 PHILLIPS "mitted to prison till she has made satisfaction; and the
 et al. "husband and his goods shall not, in such case, be charged
 "nor impeached."

3d. This *Jane Cox*, the wife, was a *sole trader*; and carried on a *separate trade* within the said city, according to the custom of the said city of *London*.

4th. The *fans*, for which this action was brought, were part of the effects of her *sole trade*.

5th. The assignees of the husband's commission seized those fans, the day the commission issued against him.

The question was put as a single one; but it was in effect double: namely,

1st. Whether the assignees of *John*, the husband, had a right to take the separate effects of *Jane* his wife, who was a *sole trader*; and apply them towards satisfaction of the debts of the husband, under the commission awarded against him, in prejudice of the separate creditors of his wife.

2d. Whether a commission of bankruptcy may issue against a married woman, being a *sole trader*.

Mr. *Eyre* (recorder of *London*) for the plaintiffs, insisted, 1st. That the husband's assignees had no such right: and 2dly. That a commission may issue against a *feme covert*, being a *sole trader*, in *London*.

First. The assignees of the husband could not seize the separate effects of the wife: for, they were no part of the husband's property.

The custom is, "that the wife is to carry on the trade upon her *sole account*: in which trade the husband is "not to intermeddle." The words of this custom were read in 3 C. 1. *Langham v. the Wife of John Bexett*, Cro. Car. 68. *Littleton's Rep.* 31. and *Hatley*, 9. S. C. And it appeared, that by the custom, she is to have all advantages, and to be sued, as a *feme sole*. Also it is part of the custom, "that if the husband and wife "shall be impleaded, the wife shall plead as a *feme sole*: "and if she pleads false, she shall be committed to prison "till she has made satisfaction; and the husband shall "not be charged nor impeached."

[1778] The husband is joined in an action brought against her, only for conformity: but execution shall be only against the wife; though the judgment be against him. She must be supposed to have wherewithal to make satisfaction: otherwise, it would be absurd and unreasonable to commit her "till she makes satisfaction." Therefore she has clearly a capacity to have property of her own.

I have looked through all the books; but find very few authorities on this head. In the note at the end of

Langham's case as reported in *Cro. Car.* 68. a case betwixt *Geppings* and *Harding*, in the Year Book of *M.* 29 *H.* 6. *rot.* 314. is mentioned and referred to; but the case is not to be found in the Year Books. It is said to have been trespass for goods sold by the delivery of the feme. Issue was taken "whether she was a feme sole." And it was found "that she was not a feme sole merchant." So it is there stated.

1765.
LAVIE
and another
v.
PHILLIPS
et al'.

Lord MANSFIELD—The *custom itself* is not disputed; only, the *consequence* or *extent* of it.

Mr. Recorder—In the Year Book of 21 *H.* 7. *fo.* 18. *pl.* 29., where the tenant had pleaded a feoffment; and the plaintiff had replied "that the feoffor was under age, and when he came of age had entered upon the defendant, and enfeoffed the plaintiff;" to which the defendant had rejoined "that there was a custom in the vill for an infant of the age of fifteen, to make a feoffment—which was objected to, as a *departure*—*Palmer*

(then a * judge) in order to prove it to be a departure, * He was only puts a case of a rejoinder of a custom in *London*—a serjeant.

"As in *this case*—In a writ of trespass, I say that a woman was seised of the same goods, as of her proper goods, and gave them to me: wherefore I took them. And I give colour to the plaintiff. And the plaintiff says, that at the time of the gift, she was his wife, &c. To which, I say there is a custom in *London*, that women are sole merchants: wherefore, &c. This is a clear departure. So here. Wherefore, &c."

The wife has a *complete property* in the effects of her sole trade.

As to any objection arising from the commission against the husband, as being tantamount to the *husband's intermeddling*—It was not with his or her consent; and, at the utmost, can extend only to her *future dealing*. But the case of *Cecil and Juxon v. Juxon*, in vol. [1779] 1. p. 278. of Mr. Baron *Atkyns's Reports*, proves that he could not intermeddle.

Lord MANSFIELD—That was only securing the woman's property. And a woman's separate property has been secured by a court of equity, in several cases: but that does not, nor did there depend upon any particular custom.

Mr. *Eyre*—Wherever she continues liable to her own separate debts, her property in her effects must necessarily remain in her, for the purposes of the trade: otherwise, she would be liable to perpetual imprisonment.

This invasion upon her property could not have been made in the case of the wife *herself*, if she had not become a bankrupt: but it is much more unreasonable, now it is the case of her *separate creditors*.

1765. The second point is "whether a feme sole trader in
 LAVIE "London CAN become a bankrupt."
 and another Now this is a consequence of her sole trading: it follows
 v. of course. He mentioned an instance in * Lord Hard-
 PHILLIPS wicke's time; but said that the books which would have
 et al.' verified it were lost, and therefore could not be searched.*

* Mr. Seare (a
 bench of the *Middle Temple*) informs me, "that this was a commission against
 "Mary Dennis (wife of *Peter Dennis*,) a linen draper and sole trader in *London*.
 "It was dated the 12th *March* 1741; and on the 16th the commissioners (Mr.
 "A. Kyns, Mr. Seare, and Mr. *Osbaldeston*) declared her a bankrupt." See Mr. Baron
Atkyns's Reports. Vol. 1. Pa. 206. Case 110. *ex parte Carrington*; on a petition to
 supersede a commission against *Dorothy Jones*, because she was a married woman: the
 Lord Chancellor dismissed the petition; declaring "that as she was admitted to
 "be the daughter of a freeman of *London*; and appeared plainly to be a separate
 "trader, by the custom of *London*: she was clearly liable to bankruptcy, *notwith-*
 "*standing her coverture*." See also *Comyn's Digest*, Vol. 1. pa. 521. and *Blackstone's*
Commentaries, Vol. 2. pa. 477. Both of them in point "that a feme covert mer-
 "chant may be a bankrupt;" or (as Mr. Justice *Blackstone* more fully expresses it)
 "that a feme covert in *London*, being a sole trader according to the custom, is
 "liable to a commission of bankrupt." (N. B. Mr. J. *Blackstone* seems to found
 his assertion upon this very case: at least, he cites *only this case* in proof of it.)

(See it particularized by Lord *Mansfield*, post. pa. 1828.)

If she might become a bankrupt, then her assignees
 had a right to demand these goods in an action of trover,
 in the manner they have now done.

Mr. *Dunning*, on behalf of the defendants, did not
 dispute the custom: but (admitting it) argued to this
 effect.

The present question turns upon the *import* and *extent*
 of it.

[1780] It cannot be taken upon so large a ground as has been
 insisted on. The custom does not, *in terms*, express any
 such thing. I take the custom from *Liber Albus*. There
 is nothing in it that *takes away* from the husband any of
 his *marital* rights: nor does it *give* the wife any *exclusive*
 rights. It only exempts him and his effects from being
 liable to her debts.

The husband may put an *end* to his wife's sole trade,
 whenever he *pleases*: and at the *end* of it, the profits of
 it will be *his property*. His power over her effects, and
 his property in them, always remain in him; though
 subject to a right of action in her creditors.

It does not follow from this custom, or from any branch
 of it, that the effects of the wife are protected from being
 liable to the demands of her own husband or his creditors.
 He has the same property in them, as a husband has in all
 other cases: and he may dispose of her effects, in his life-
 time, or by his will. If so, they are become legally vested
 in his assignees under the commission of bankruptcy
 issued against him: and, consequently, they were law-
 fully seized by his assignees.

Local customs are stricti juris: they are derogatory from the common law; and shall not be extended. 1 Ro. Abr. 567. Letter G. 2 Leon. 109. Sir John Savage's case.

1765.
LAVIE
and another
v.
PHILLIPS
et al.

This custom is totally *silent*, as to the interest and property of the husband in the wife's goods. Therefore it shall be left to the common law.

THE *suing and being sued as a feme sole*, is a privilege confined to residence in the city, and to the city-courts. Here, she must sue, and be sued, *with her husband*. Tr. 25 Eliz. Moore, 135. Stanton's case. 1 Leon. 131. Chamberlain and Thorp's case. 1 Modern 26. anonymous. Cro. Car. 69. Langham v. Bennett. Comberb. 12. Swan v. Mace.

As to the right of the husband over the effects of his wife—If costs be adjudged upon her suing in the spiritual court *pro reformatione morum*—, the husband shall have the costs recovered by her: or he may release them.

As to the case cited in Cro. Car. 69. from the Year-books—Delivery by an infant is an excuse, in trespass.

EVERY *scintilla* of interest in the bankrupt passes to his assignees: and here the property was vested in the husband's assignees, before the wife's assignees had any right.

[1781]

As to the second question—Such a woman, married and using a sole trade, is *not* within the *spirit* of the bankrupt-laws; though within the *letter*. This is only the second instance of such a commission issuing. There was such a one in the year 1741: but that was not litigated; it passed *sub silentio*.

Upon the statutes of Queen Elizabeth and King James, the words of them do indeed take in this case: but the provisions of them relate only to persons *sui juris*.

SOME of them are *penal*, and even *capital*: which must relate to *free* agents. But a *married woman* is *not* so: she is under the coercion of her husband. He may prevent her from surrendering.

OTHERS of these provisions relate to *lands*, and *chattels real*, and *choses in action*: and *these* were never meant to be taken from a married woman. She may have dower, or jointure: and how is she to convey her right? It was not meant to make her goods liable to such a severe execution as these acts render the objects of them liable to. She has not such a sole property in them, as to exclude the rights of her husband.

Her creditors may take their remedy under the commission issued against her husband.

Mr. Eyre, in reply.

As to the second point—A *feme covert*, sole trader, is within the *spirit* of the bankrupt-acts, as well as within the *letter*.

1765. As to the first point—The positions which I have laid down are consequences without which the custom itself can not exist.

LAVIE
and another
v.
PHILLIPS
et al.

The husband had no right to seize his wife's effects; she being a sole trader, in *London*: and the husband's assignees are assignees of *his property only*; not of his *marital rights*, whatever they may be; and of which, such a power of seizure was certainly no part.

[1782]

Lord MANSFIELD said, he had an opinion at the trial; and having thought of it since, he now *continued* in it: and he added—"I am very well *satisfied* in my *opinion*."

As to the single instance of a commission having ever before actually issued against a feme covert sole trader—It is perhaps only the *first that has been found*: it does not follow, that there certainly *was* none before it. There probably were others; though not now recollected, or particularly ascertained.

His lordship having particularly stated the case, observed, in repeating that part of it which agrees "*Jane* to be a *sole trader*, and to have carried on a *separate trade* within *the city according to the custom of it*;" that it must, consequently, be a trade wherein her husband did *not* intermeddle.

He then shortly rehearsed the arguments of the counsel; and took notice that Mr. *Dunning* had put the question upon this point—"Whether the husband is *totally excluded* from *all power over the effects of the wife*."

Whereas the present question is *not* between the *husband and wife*; but between *his* and *her creditors*: *she* is *no party* to this case. Therefore it is not necessary to go into *that question*.

But, taking it for granted, "that the husband might *put a stop to the wife's separate trade in futuro*; and *after that* might have a right to the residue;" (I say, *in futuro*; for he certainly could *not* do it with a *retrospect*;) yet it does not follow, that he can take to himself what belongs to her *creditors*. This would *destroy* the custom, by rendering it nugatory and ineffectual. And if he himself could not prejudice her *creditors*, his *assignees* can not do it.

The feme sole trader in *London* under this custom must indeed, bring her action in *London*; but such custom would be allowed in any other court, in a defence by the husband.

Perhaps there might be difficulty in the *wife's* having a remedy, *herself*, against her husband: but there is none, *as to the creditors of the wife*. They are intitled to a remedy for the seizure of her effects, out of which they were to be paid their just debts.

The separate effects of the wife are, in the *first* place, liable to *her* separate creditors: but if they were liable, in the first place, to the *husband's* debts, this would destroy the end of the custom.

1765.
LAVIE
and another
v.
PHILLIPS
et al.

In joint-commissions of bankruptcy, *joint* debts are first paid; then, the *separate* debts: so also, where there are different joint-commissions.

As to the second point—"Whether she be *liable* to a "commission"—

The statutes of bankruptcy extend to the city of *London*; and the words of the statutes take in this case. And it is for the benefit of the *wife*, "that she should be "liable to a commission;" because, otherwise, she would be liable to *perpetual imprisonment*. It is also for the benefit of the *creditors*; (who can not, by reason of this custom, come at the husband.) There is no reason to take this case out of the acts relating to bankruptcy. The husband himself was not liable to the wife's creditors; nor had he any demand upon them. The consequences of her bankruptcy, as a sole trader, concern only the relation in which she stands to *her creditors*; and they, to *her*.

As to the precedents—There is no method of *searching* for commissions that may have issued against sole traders; but here is one instance produced, of such a commission; which is very express. It issued in Lord *Hardwicke's* time; and was directed to Mr. *Athyns*, Mr. *Craster*, and Mr. *Seàre*, three experienced gentlemen: and Lord *Hardwicke* allowed a * certificate.

As to Mr. *Dunning's* supposed inconveniences—This custom affects no rights but such as are the subject of the custom; not marital or any other rights.

* It was signed by the commission-ers, on the 17th July, 1742.

And as to the danger to the wife, from the coercion of her husband—She could never be liable to the guilt of a capital offence, where she was under an invincible necessity.

I am of opinion, that a commission may be taken out against her as a sole trader, with respect to her separate effects in trade.

Mr. Justice *WILMOT*—This is a *consequence* of the custom. The custom establishes her being a sole and separate trader: it follows of course, that these goods, in her separate trade, may be taken and seized under a commission of bankruptcy against her.

The present question is not now between the husband and wife; but between two sets of *creditors*, those of the one, and those of the other. She has, by this custom, particular privileges; and her creditors have particular rights, as against her. These customs (though local) are to be considered as allowable under the general law of the land,

1765.
LAVIS
and another
v.
PHILLIPS
et al.'

when they come in question in *other* courts; though the *action* must be brought in the *local* court.

As to the husband's intermeddling—He certainly cannot do it, so as to injure her *creditors*: it would be a strange thing indeed, if the husband could intermeddle so as to affect the *creditors* of the wife, to their prejudice. And if he *himself* can not do so, no more can his *assignees*, who stand in *his* place.

The second point is of consequence. It must be *confined* to her *debts in the way of her trade*. And as to that, she is within the words and meaning of the bankruptcy-acts: and her *assignees* stand just in her place.

The husband's *assignees* can not take her effects; nor her *assignees*, his. But, the commission against *her*, ought to be confined to matters in the *way of her trade*.

Mr. Justice YATES was of the same opinion.

An action *upon* the custom can only be brought in the mayor's court of *London*; but the custom may be *pleaded in bar*, in a *superior* court. *Bro. Customes* 43. It may be used in a *superior* court by way of *defence*: and in such cases, the *superior* court will *take notice* of the custom.

The only question here is, "whether the effects of the " wife belonged to *HER assignees* under the commission " which issued against her."

The property in these goods was transferred to them: and they certainly had a right to recover them.

In 1 *Shower* 183. *Fabian v. Plant*—Sir *Bartholomew Shower* said, that " the husband shall not put in bail." The wife alone is chargeable; and the *husband's effects* are *not*: therefore he cannot take hers from her *creditors*.

A commission being issuable against her is a *consequence* of the custom for her sole trading.

[1785] As between the husband and wife, he has a right to seize her effects: *SHE* has no remedy against him, from the custom. But he can not meddle with them, so as to affect her *creditors*.

There can be no objection from the bankrupt-laws. She is within them: but she could not be liable to capital punishment, if she was really under her husband's *coercion*.

I have not the least doubt about this case.

Mr. Justice ASTON said, he remembered a case in *C. B.* in his time, in the manor of *Harwell*: where this custom of *feme covert* sole trader was established.

Her person and her effects in trade are answerable to her *creditors*: and the husband is bound, by an implied consent.

The statutes of bankruptcy are, but as a *statute-exc-*

cution upon her effects in trade, so far as they are liable by law. 1765.

The assignees of the husband only stand in his place: and he himself could not have receded from his consent. He may put an end to her sole trade, *in futuro*: but he can not do it, with retrospect. He can not take away the prior right of her creditors to her effects as a sole trader. This custom does not interfere with any marital rights: it respects only trade and commerce.

Per Cur. unanimously,

JUDGMENT for the PLAINTIFF.

Mr. Justice WILMOT observed, that this custom subjected the wife to an execution: to which she was not liable at common law.

REX versus ROGER AIKIN.

Wednes. 30th

Nov. 1765.

THE defendant had been convicted on the hawkers and pedlars act: and the conviction was removed hither, by *certiorari*.

Conviction on the hawkers act.

Sir Fletcher Norton objected to the conviction: for

1st. He was *not summoned*, to answer to the charge: at least, it does not appear, that he was summoned. [Sec Cowp. 241.]

2dly. The witness was *not examined in the presence* of the defendant: and therefore he did *not hear the evidence*; [2 Durn. 23.] 1786]

as far as appears upon this conviction. V. 2 Sir J. S. 1240.

Rex v. Baker. †

3dly. The witness does not swear him to be a hawker and pedlar at the *time* of the conviction. † And V. ante, p. 1161, 1165, 1166. Rex v. Vipont, et al.]

Mr. Wallace was for the prosecutor. But

Pasch. 1761.

THE COURT were unanimously of opinion "that these objections were not well founded." For

1st. He did *appear*, and denied the guilt; but did *not desire further time* to produce his evidence, or to prove his innocence. He seems therefore to have waved any further defence.

2dly. It may be *presumed*, that the witness was examined in his presence. [8 Durn 285.]

3dly. There is an inaccuracy in this conviction: but it appears that the defendant exposed his goods to sale, on the 15th; and the conviction was on the 17th.

Per Cur. unanimously,

CONVICTION AFFIRMED.

REX versus HANN and PRICE.

MR. Morton and Sir Fletcher Norton moved, upon Personal appearance will not be dispensed with on giving judgment, where the sentence may possibly be a corporal punishment. Tuesday the 12th of this present November, on behalf of the defendants, who were borough-justices of Corfe.

1765.
 REX
 V.
 HANN and
 PRICE.

* V. ante
 p. 1716.

castle, and had *confessed* themselves guilty of an information * charging them with a very great misbehaviour in the execution of their office, (*viz.* refusing a licence to a public-housekeeper, out of pique and resentment, and upon bad motives, arising from their attachments in respect to a late parliamentary election; and acting therein under the influence of one of the candidates;) for a rule to *DISPENSE with the PERSONAL appearance* of the defendants, on the undertaking of their clerk in court "to answer for their fines."

[1787] It was defended immediately (without any rule to shew cause) by Mr. Serjeant *Davy*, Mr. *Thurlow*, and Mr. *Dunning*, of counsel for the prosecutors. And

THE COURT, upon full debate, were unanimous in refusing the motion.

The *general* doctrine laid down by the court, and agreed by the counsel on both sides, was that though such a motion was subject to the discretion of the court, either to grant or to refuse it, where it was *clear and certain* that the punishment *would not be corporal*; yet, it ought to be *denied* in every case where it was either *probable* or *possible* that the punishment *would be corporal*. And though the court did not then *declare* what punishment they would inflict upon the present defendants, yet they saw the offence in so atrocious a light, as to be far from determining "that it would be *only pecuniary*." And Mr. *Justice WILMOT* and Mr. *Justice ASTON* thought that even where the punishment would most probably be *only pecuniary*, yet in offences of a *very gross and public nature* (as they held this to be) the persons convicted should appear *in person*, for the sake of *example* and *prevention* of the like offences being committed by other persons; as the *notoriety* of their being called up to answer criminally for such offences would very much conduce to deter others from venturing to commit the like.

THE COURT therefore, upon the whole, unanimously denied the motion.

THE SENTENCE of the court now (on this 20th of *November*) pronounced upon them was, that they should be *committed* for a month; *fined* 50*l.* a piece; and imprisoned till the fine was paid.

Thurs. 21st
 Nov. 1765.

A defendant who surrenders in discharge of his bail, must be charged in custody within two terms.

RUSSELL *versus* STEWART.

A MOTION had been made for the *discharge* of the defendant out of custody, for want of having been *charged* in custody, within *two terms*. The motion was

founded upon a rule of this court, made in *Trinity* Term 1716, 2 G. 1. whereby it is ordered "that if any defendant shall be committed to the custody of the marshal, or charged in custody of the marshal, or arrested or committed by virtue of the process of this court to the custody of any sheriff or other officer whatsoever, at the suit of any plaintiff; and shall so remain in custody for two terms; and the plaintiff shall not declare against such defendant within that time; such defendant, after the end of the second term after such imprisonment, shall be discharged out of the prison where he shall be so detained, on filing common bail signed by one of the justices of this court, without giving notice to the plaintiff or his attorney."

1765.

RUSSELL

V.

STEWART.

[1788]

Cause was now shewn: and the question was whether the "defendant, who was not in custody upon being TAKEN, but had SURRENDERED himself in discharge of his bail, was or was not SUPERSEDEABLE within the abovementioned general rule and its construction, and the practice of the court."

LORD MANSFIELD—No doubt, the time runs from the time of NOTICE of the defendant's being in custody. [4 Burr. 2060. 3 Wils. 327.]

Per Cur.—

RULE MADE ABSOLUTELY, for discharging the defendant out of custody.

MEMORANDUM—The debt was a large one; upwards (it is said) of 3000*l*. And an * action was brought by the plaintiff, soon after this motion, against his attorney Mr. Palmer, for his neglect in omitting to charge the defendant within time: which action was tried in C. B. about 24th or 25th June 1766; and * 500*l*. damages given against Mr. Palmer.

* V post, p. 2060. Pitt v. Yalden, 18th and 19th May, 1767.

GRAY versus ASHTON.

THE defendant having obtained a judge's order upon the terms (amongst others) of "pleading an issuable plea," put in a *sham demurrer*.

The plaintiff's attorney, looking upon this as a mere evasion of the judge's order requiring the "pleading an issuable plea," signed judgment; supposing that a *sham demurrer* is not an issuable plea.

The defendant obtained a rule to shew cause why this judgment, which the plaintiff's attorney had signed, should not be set aside. And cause being now shewn; it was prayed by the counsel for the plaintiff, that this rule might be discharged with costs.

THE COURT were of opinion, "that it ought to be so."

Sham demurrer is not within an order for pleading issuably.

1765. A distinction was taken by the court, between a *real* and *fuir* demurrer, and a *SHAM* one; the former is an issuable plea, within the intent and meaning of the judge's order: the latter, is only an *evasion* of it.

RULE DISCHARGED, with costs.

Friday, 23d

Nov 1765.

One alone cannot bring error, where there are several.

[See 1 Durn. 469.]

KNOX, ESQ. *versus* COSTELLO.

THIS was a writ of error from *B. R. in Ireland*, to reverse a judgment of their's, affirming a judgment in *C. B.* there, in an action of debt for 1800*l.* brought against *William Knox* by *Christopher Fallon* deceased; and also affirming the adjudication of *C. B.* in *Ireland*, of execution of the same judgment upon writs of *scire facias* issued out of the said court of *C. B.* in *Ireland*, against the said *Knox*, at the suit of *Edmond Costello* and *Edmond Fallon*, surviving executors of the said *Christopher Fallon*.

It appears upon the return, that the original action was brought in *C. B.* in *Ireland*, by *Christopher Fallon*; and that he had recovered his debt, and also 1*l.* 18*s.* 5*d.* for damages *occasione detentionis debiti*. That a *scire facias quare executionem non* issued, at the suit of the said *Edmond Fallon* and *Edmond Costello*, suggesting "that *Christopher Fallon* was dead, and that they were his surviving executors." That upon this *scire facias*, the defendant pleaded payment: which was found against him, with sixpence damages. Whereupon it was adjudged, "that they (as his executors) should have execution against *Knox* for the debt and damages aforesaid:" and it was also adjudged, "that they do recover against the said *William Knox* their costs and expences aforesaid, to sixpence by the jury aforesaid in form aforesaid assessed; and also 17*l.* 14*s.* 8*d.* for their costs and expences aforesaid adjudged to them at their own request, by the court here, by way of increase according to the form of the statute in such case made and provided; which said costs and damages, in the whole, amount to 17*l.* 15*s.* 2*d.* and that the said *Edmond Fallon* and *Edmond Costello* have execution, &c."

Only one of the executors appeared to the writ of error in *B. R.* in *Ireland*, viz. *Edmond Costello*; who, alone, sued out the *scire facias quare executionem non*, in *B. R.* there; and yet the court affirmed that judgment of *C. B.* for both; and the adjudication was "that both should recover."

[1790] This cause came on to be argued upon *Tuesday* last; but was then adjourned; and now stood in the paper again.

Mr. *Ashhurst*, for the plaintiff in error, made these two objections—

1st. The court below have given *damages* for non-payment of the money: whereas *damages* can not be given in a *scire facias*. 1 Ro. Abr. 574. letter P. pl. 5. "In a *scire facias*, no damages shall be recovered." 2 H. 6. 15. Nor could costs, till the statute of 8, 9 W. 3. c. 11. "for the better preventing frivolous and vexatious suits." [V. sect. 3] He also cited 6 Mod. 157. *Fanshaw v. Morrison*, Hil. 3 Ann. B. R.

1765.
KNQX
V.
COSTELLO.

2d Objection—The *scire facias quare executionem non*, in the King's Bench in Ireland is prayed by Edmond Costello only; though the writ of error is brought against the two executors: and yet there is no suggestion "that either of them is dead:" though *only one* of them appears to it, and prays the *scire facias*.

The case of *Brewer v. Turner* in 1 Sir J. S. 233. is in some degree applicable to the present. The judgment was against two; and was so described in the writ of error: but it was laid to be only *ad grave damnum* of one of them; though it did not appear, that the other was dead. There it was determined "that both defendants ought to join in the writ of error." Here, they ought both of them to be joined.

Mr. Wallace, *contra*, for supporting the judgment in C. B. in Ireland, and also the judgment of affirmance in B. R. there.

He allowed the first objection to be good, if well founded: and mentioned the case of *Henriques v. Dutch West India Company*, in 2 Sir J. S. 807, 808. and in 2 Lord Raym. 1532, S. C. where the judgment was reversed for the damages. But he denied that damages are here given for the delay of execution: the words are * only "that he has been damaged and put to costs." The damages are only 6d. on a debt of 1800l. and the judgment is that the plaintiffs recover their costs and expenses aforesaid, to 6d. by the jury assessed; and for increase of costs and charges 17l. and upward.

* The jury found "that Knox did not pay the aforesaid debt and damages, so as aforesaid recovered

against him by the aforesaid Christopher Fallon, by the said judgment in the said several writs of *scire facias* mentioned, &c. And that the said Edmond Fallon and Edmond Costello, by the non-payment thereof, as executors of the said Christopher Fallon, were DAMNIFIED AND PUT TO COSTS, to the amount of sixpence sterling."

But if it should be admitted "that this is damages for [1791] "the delay of execution;" yet the judgment ought to be reversed only for the 6d. as was done in the case of *Henriques* and the *Dutch West India company*.

As to the 2d objection—No case is cited in proof of it. No objection was made. It was the plaintiff in error's fault, *not to bring in* the other executor. However, one executor alone may call upon the plaintiff in error, to

1765.

KNOX

v.

COSTELLO.

assign errors; and if the judgment shall be affirmed as to one of them, it is and must be affirmed as a good judgment with respect to both of them.

BUT here, the other executor (*Edmond Fallon*) shall be intended to be dead. *Hensloe's case*, 9 Co. 36. b.

Mr. *Ashhurst*, in reply. The judgment must be reversed in toto, if at all.

The 6d. is *as inadequate* a satisfaction for costs, as it is for damages.

Lord MANSFIELD was not in the court.

Mr. Justice WILMOT (after stating the case particularly) said "the court ought to support a judgment recovered upon the merits."

This original judgment was obtained so long ago as the twenty-third year of King G. 2. And the plaintiffs below have not yet obtained the effects of it.

The first objection turns upon a fact, which does not support the objection. To be sure, *damages for delay of execution* can not be given in a *scire facias*; nor could costs, till the statute of 8, 9 W. 3. c. 11.* And if this case were so, the judgment might be reversed as to the 6d. and affirmed as to the rest.

But here, the being "damified and put to costs to the amount of 6d." is only meant as a *foundation* for the *costs de incremento*: and the judgment is "that the plaintiffs shall recover 17l. 14s. 8d. for their costs and expenses, &c."

The second objection is "that the *scire facias quare executionem non* is brought by only one of these two executors."

[1792] As to the case of *Brewer v. Turner*, in *Strange*, cited by Mr. *Ashhurst*---It may be right: for both are there plaintiffs, to reverse the judgment.

But a *scire facias quare executionem non* is only to bring the plaintiff in error in, to assign his errors. He comes in, upon it, and assigns his errors. Therefore he waved any objection, and admitted the one executor to be sufficient to call upon him merely to assign errors. He might perhaps have moved to quash it: but as he did not challenge it, he has waved the objection to it; and we are not to presume the other executor to be alive.

No case is cited to bind us to reverse this judgment: and it can be attended with no inconvenience, to affirm it.

Mr. Justice YATES allowed the principle of the first objection; but denied that the fact supported it. "*Damages*" may mean costs. The fact is not, therefore, as it has been alledged.

As to the second objection---He was very clear, that the judgment ought to be affirmed in toto. Mr. *Ashhurst's*

case cited from 1 Sir J. S. 233. is not like *this* case. *Hacket v. Herne*, in *Canthow* 7. indeed is a determination "that a writ of error by one alone upon a judgment against two, is *not* good." But that is upon account of the inconvenience that would arise from a perpetual delay of the execution, if *every* defendant might bring a writ of error by himself. Now *that* reason does not hold, in the present case, where these executors are *defendants* in error, and not plaintiffs.

1765.
KNOX
v.
COSTELLO.

Mr. Justice Aston declared himself to be of the same opinion.

Whereupon, by the unanimous opinion of all three, the

JUDGMENT WAS AFFIRMED.

HOLCOMBE and another *versus* WADR.

IT was declared by Mr. Justice *Wilmot* and Mr. Justice *Yates* (Lord *Mansfield* being absent, and Mr. Justice *Aston* silent) that the general rule of P. 15 C. 2. about the necessity of an attorney for the defendant being present, "whenever a person *in custody* gives a *warrant of attorney*, * *TO CONFESS JUDGMENT*," is *confined* to judgment in the *particular cause* whereupon he is in custody; and does *not* extend to warrants of attorney given "to confess judgments in other actions." And this, they said, has been so settled. (V. 2 Lord *Raym.* 797. *Finn v. Hutchinson*: where it is settled; and the reason of the rule is given.)

Necessity of the presence of an attorney on the execution of a warrant of attorney by a prisoner. [See 4 Durn. 493. 1 East 242.] * This rule forbids bailiffs and sheriff's officers to exact or take acknowledge

from any person being in their custody by arrest any warrant to a judgment, but in the presence of an attorney for the defendant.

HARVEY *versus* PEAKE.

MR. Cox, on behalf of the defendant, had moved on *Tuesday* the 19th instant, in arrest of judgment: and one of his objections was to the manner of joining issue. For that this issue was joined (or rather not joined) in these words—"et *prædictus* A. P. *similiter*;" which was a repetition of the *same* name (*viz.* that of the defendant;) instead of saying, "et *prædict.* the *plaintiff* *similiter*:" so that, in effect, the party has joined issue with *himself*.

Judgment to be arrested for a clerical error in joining issue.

Lord MANSFIELD advised Mr. Cox to drop this objection to the want of joining issue; and to rely on his other objections in arrest of judgment.

However, Mr. Serjeant *Forster* now renewed it; observing that this was the plaintiff's own mistake; and not the defendant's; and he cited *Comyns* 376. *Walker v. Lister*, and 2 Sir J. S. 1117. *Heath v. Walker*, to prove it fatal.

1765.

HARVEY

V.

PEAKE.

But the three judges (Lord Mansfield being now absent) over-ruled it, upon

Mr. Justice WILMOT's rehearsing the case of *Probyn v. Churchman*, M. 5 G. 2. B. R. (which I took the liberty of mentioning to have been since confirmed by a latter one of *Cleaver v. Jordan*, Mich. 7 G. 2. 1738. B. R.)

The RULE for shewing cause why the judgment should not be arrested, was
DISCHARGED.

N. B. That Lord Chief Justice *Lee* (then only Mr. Just. *Lee*) did, in both these last-mentioned cases, cite another case: of *Rawbone v. Hickman*, in P. 9 G. 1. in this court: which was debt upon bond; and the defendant pleaded "*solvit ad diem*," *et hoc petit quod inquiratur per patriam*. The plaintiff said, "*Et pradiet. the defendant similiter*."

[1794] This was moved in arrest of judgment: but the objection was over-ruled; and judgment affirmed.

Saturday, 23d
Nov. 1765.

ZOUCH, ex dismiss. ABBOT and HALLET, versus
PARSONS.

[S. C. 1 Bl.
575. and cited
1 Brown, 109.]

Conveyance
of an infant
mortgagee is
binding, and
cannot be
avoided by his
entry during
infancy.

THIS was a special case in ejectment: and the question was "whether an INFANT's conveyance *by lease and release* was absolutely VOID, or only VOIDABLE."

This cause had been twice tried. Upon the first trial, an incomplete case had been drawn up and agreed upon; which having been argued on Friday 17th June 1763, by Mr. Serjeant *Glynn* for the plaintiff, and Mr. *Dunning* for the defendant, LORD MANSFIELD then observed, that many circumstances were necessary to be known, besides those contained in the case as it then stood; which was not sufficiently stated, to come at the merits: and if the parties could not agree upon the facts, the cause must be tried over again, and those facts ascertained. It was therefore adjourned at that time, in order for the necessary facts and circumstances to be more completely stated: and, the parties not agreeing to them, a second trial became requisite.

It was tried this second time, at the Lent assizes 1764, for *Somersetshire*, before Mr. Justice *Yates*; when a verdict was found for the plaintiff, subject to the opinion of this court, upon the following case.

Special case. (a) *John Bicknell*, being seised in fee of the messuages and lands in the declaration mentioned, by indenture of lease and release dated 24th March 1750,

(a) See 4 Brown, 509: & Durn. 51, 63. 1 Vex. 304.
3 Atk. 710. 16 Vin. 481, 486. pl. 3.

and 25th March 1751, conveyed the premises to *William Cook* and his heirs, by way of mortgage, for securing the repayment of 280l. *William Cook* afterwards died, leaving *John Lamb Cook*, AN INFANT, his eldest son and heir at law; and also leaving his widow *Elizabeth Cook*, and the said *John Lamb Cook* his joint-executors and residuary legatees.

1765.
ZOUCH
ex dimiss.
ABBOT and
HALLET
v.
PARSONS.

John Bicknell, the mortgagor, afterwards brought the title-deeds of the premises to one Mr. *John Williams* an attorney, and desired him to procure the sum of 400l. upon the same security; in order to pay off the said mortgage to the *Cooks*, and for other purposes. *Williams* applied to the lessors of the plaintiff, who agreed to advance the same: and by indentures of lease and release bearing date respectively on the 29th and 30th of June 1761, between the said *John Lamb Cook* (then being an infant of between sixteen and seventeen years of age) and the said *Elizabeth Cook*, of the first part; the said *John Bicknell*, of the second part; and the said *Henry Abbott* and *Catharine Hallett*, (lessors of the plaintiff) of the third part; the said *John Lamb Cook* and *Elizabeth Cook*, in consideration of the sum of 280l. in the said release mentioned to be to them paid by the lessors of the plaintiff, granted and released, and the said *John Bicknell*, as well for the consideration aforesaid, as for the further sum of 120l. to him mentioned to be paid by the said lessors of the plaintiff, granted, ratified, and confirmed the said premises to the said *Abbott* and *Hallett*, and their heirs, to hold to them their heirs and assigns for ever.

[1795]

The said Mr. *Williams* when he drew the last mentioned mortgage-deed, apprehended that the whole principal sum of 280l. continued due to the representative of the said *William Cook*, upon his said mortgage; and therefore expressed that sum to be the consideration paid to them: but, in fact, the sum of 100l. only principal money, and 9l. for interest, then remained due thereon; the said *William Cook* having been paid the other 180l. in his life-time; and accordingly, at the time of the execution of the said last-mentioned indentures of lease and release, *Elizabeth Cook* received 109l. being the principal and interest then remaining due to her son and her as representatives of her late husband, upon his mortgage; and the residue of the sum of 400l. was received by the said *John Bicknell* from the lessors of the plaintiff.

The said *John Bicknell* continued in possession of the premises from the time of his conveyance thereof to the said *William Cook*, until the year 1756; when he conveyed the premises, by way of mortgage for 200l. to one *Thomas Thorne*, for a term of years, who in March 1762

1765.
ZOUCH
ex dimiss.
ABBOT and
HALLET
v.
PARSONS.

assigned the said term to the defendant *Henry Parsons*, in consideration of the sum of 228l. in the said deed of assignment mentioned to be the principal, interest and costs then due from *Bicknell* to the said *Thorne*: but before the assignment to the defendant, Mr. *Williams*, then being attorney for the lessors of the plaintiff, gave the defendant notice of the mortgage made to *William Cook*, and of the assignment of it to the lessors of the plaintiff.

On the 27th day of *March* 1764, two days before the day of holding the assizes at *Taunton*, the said *John Lamb Cook* made an entry on the premises, in order to avoid his said lease and release to the lessors of the plaintiff.

[1796] " The question is " whether the lessors of the plaintiff are intitled to recover the premises."

This new case was argued on *Friday* the 8th of this month, by Mr. Serjeant *Glynn*, for the plaintiff, in support of the infant's lease and release; and Mr. *Dunning*, for the defendant, who insisted upon their being absolutely void.

Mr. Serjeant *Glynn* urged, that infancy is a personal privilege; and that the infant only can avail himself of his infancy: no other person can do so. He cited *Whittingham's* case, 8 Co. 43. as an authority for him: though he owned that this case is not quite conclusive, as it is confined to feoffments. Yet it shews, that privies in estate (as joint-tenants,) and privies in law (as lords by escheat,) shall not take benefit of the infancy of another. And this doctrine, he said, applies to ALL OTHER conveyances whatsoever.

If the infant does not object, it is good against all the world. He cited *Co. Litt.* 377. *Co. Litt.* 51. *Bacon on Uses*, 355. and he added, that the doctrine is clearly stated in *Humphreston's* case in 2 *Leon.* 216, 218. and *Moore* 105. S. C. (there called *Lane v. Cooper*), the 7th point of it.*

* V. S. C. in
Bendl. 195.
Owen, 64.
Dyer, 337. a.
and 1 And. 40.

It is not a NULL agreement; because the person of full age is bound: the choice of standing to it, or not agreeing to it, is not reciprocal.

Therefore *John Lamb Cook's* act was good at the time; and stands good: and the plaintiff has a good title to recover now.

The great point to be attended to, is the BENEFIT of the infant.

In the case of an infant's making a lease without reserving rent, it must therefore be void. But a lease made merely in order to bring an ejectment, is good: for, there the infant is not prejudiced.

Here, the infant is not, can not be prejudiced:

The mother alone, being joint-executor with him, had a right to receive the money, and give a discharge for it: and after it was received, the infant was only a trustee.

Therefore even with regard to the *infant*, it is not a void act; but only *voidable*.

Mr. *Dunning*, for the defendant, the second mortgagee, agreed that both the first and second mortgagee were *equally* intitled to favour; and that therefore *strictness* of law must prevail.

This is not a case, he said, where the court of Chancery would have *compelled* the infant to do what he has done.

The serjeant's proposition is "that the infant's act is "good, *till* dissented to by him, when he comes of age." But I say, that his dissent shall have a *retrospect*: it *rescinds* his act, and makes it void *ab initio*. And he may avoid it at *anytime*; either at the *instant* he comes of age, or *earlier*. It was formerly a doubt, whether a *dam fut infra aetatem* would lie, *after* the infant's coming of age.

He argued that this conveyance by *lease and release* was absolutely void. A feoffment and livery of seisin *personally and actually* given by the infant, was the only method that could have made it only *voidable*.

A defeasible estate is not the effect of *every* sort of conveyance. (And here he went into deep and ancient law concerning the different sorts of conveyances, and the different operations of them.)* He cited *Bro. Abr.* title * V. ante, 92. *Coverture and Infancy*, pl. 1; where it is said "that a feoffment and livery made by an infant *himself* and not "by attorney, is voidable, and not void: *nota diversitie*." 26 H. 8. 2.

Whittingham's case, 8 Co. recognises the difference between *personal* delivery of seisin, and a delivery of it by *letter of attorney*. (see pa. 45. a.) The *delivery* alone is the foundation of the *voidable* estate: and the reasoning cannot therefore be applied to any *other* sort of conveyance than a conveyance *by livery*.

He cited a case of the daughters and coheirresses of one *J. Frevil*, in (9 H. 6, fo. 6. pl. 14.) and argued from it, that a feoffment by an infant, without livery of seisin *actually and personally* given by him, is void; though a voidable estate passes by his personal livery.

And an infant's personal livery will create a voidable estate, whatever age the infant be of. Therefore though an infant's actual personal livery be good, till avoided; yet it is otherwise, where his livery is not personal.

The distinction I have taken is clear and common; and is laid down in express terms in *Finch's law*, Lib. 2. p. 102. (qu. where: for it is not in p. 102.)

1765.
ZOUCH
ex dimiss.
ABBOT and
HALLET
V.
PARSONS.

[1798]

1765.
ZOUCH
ex dimiss.
ABBOT and
HALL ET
V.
PARSONS.

In 26 H. 8. pl. 2 *Fitz-herbert* said, that an infant may plead "that he did not grant by the deed," notwithstanding that it be sealed by him; because nothing passed. And if the infant had made livery of seisin at the door of the church, peradventure this might change the case. As if he gives goods, and delivers them himself, he shall not have a writ of trespass; no more than an assize, when he makes livery and seisin *himself*: but if he makes a *letter of attorney*, it is otherwise. And *this difference* was granted by *all the court*.

Brooke adds, at the end of his abridgment of this case in *Bro. Abr.* Title *Coverture and Infancy*, pl. 1. "*Et sic vide que livery dun fait dun enfant nest semble al livery de terre ou biens per luy.*"

Yet I own, that pl. 12. of the same title seem contradictory: and it is copied into *F. N. B.* Title "*Dum fuit infra etatem.*" (V. new edition pa. 426. in margine.) Here, indeed, the livery of the deed and the livery of the land are confounded. But the Year-book (upon looking into it) appears to be misrecited: and such a question could not arise. In *Cro. Car.* 103, *Sir Thomas Holt v. Sambach*, the infant's grant was agreed to be void as to the remainder. And in *Thompson v. Leach*, 3 *Mod.* 301, and *Carth.* 435. S. C. It was holden "that a *surrender* made by an idiot or by an infant is *void ab initio*; and that any person may take advantage of it."

A *surrender* by an infant cannot be by deed, but is *absolutely void*. *Lloyd v. Gregory*, *Cro. Car.* 502; 1 *Ro. Abr.* 728.

The case of *Thompson v. Leach* is the fullest reported in 3 *Mod.* 301: and there, an infant's *surrender* was considered as *absolutely void*. A clear distinction was also taken between the deed *itself* of an infant, (the form of it,) and the *operation* of the deed: and it was determined, that all deeds by infants, and all surrenders by infants, are *void ab initio*.

[1799] It is *only feoffments* with *actual personal livery* that are VOIDABLE only. *Bro. Abr.* title *Coverture and Infancy* pl. 40. referring to 34 *Assize*, pl. 10. says "*tenetur clerement, que. release denfant de tout le droit en terre de que il ne fuit unques seisie, est void, &c. Mes aliter dicitur dun feoffment. Le reason del diversi'e semble per reason del livery del terre. Ceo nest que voidable; et lauter est void.*"

Therefore an infant's RELEASE is VOID, not voidable only.

Lord Coke had not considered this subject, or at least not expressed himself upon it, with his usual accuracy. In 1 *Inst.* 51. b. and in 247. b. he does not distinguish between the different conveyances: and he makes entry

equivalent to livery. So, in 2 *Inst.* 673, on the statute of 27 H. 8. c. 16, concerning inrolments of bargains and contracts—he plainly considered the deed as absolutely void.—“If an infant bargain and sell lands which are in the realty by deed indented and inrolled, -he may avoid it when he will: for the deed was of no effect to raise an use, &c.” So in 1 *Inst.* 45. b. (for want of considering the different forms of conveyances—) he is not accurate.

In the case of *James, ex dimiss. Aubrey, v. Jenkins*, Tr. 31 G. 2. C. B. A lease by tenant for life was holden voidable *only*, where the lease for lives was made *by livery*. Therefore Lord Coke must be understood of such conveyances as *operate BY LIVERY*.

As to infant's leases—The benefit of the infant is considered. His leases are good, if a rent is reserved upon them. But this exception arises from necessity; like contracts for meat, &c. He cannot occupy his lands himself: therefore it is necessary to validate his leases reserving rent. But this exception extends to no other case.

And it is just the same, whether the infant be six years of age, or sixteen: there is no line drawn between the different ages of an infant.

The legislature have recognized the law to have been as I say. And the act of 7 G. 2. c. 19. rectifies the inconvenience, in one respect, as to infant-mortgagees.

An infant's conveyance by lease and release is absolutely void. The deeds are substantially bad; though “non est factum” can not be pleaded to them. This conveyance never conveyed any interest whatsoever: and the plaintiff can neither have judgment for his term, nor even for damages; by reason of the retrospect.

Mr. Serjeant Glynn, in reply,—premised that the court did not mean to introduce a new case, upon the second trial: they only meant to take the matter up, as the facts stood and appeared at the time of the first trial, when they were defectively stated to the court.

This conveyance was good till the infant avoided it.

As to *dum fuit infra etatem*—What Mr. Dunning says is not inconsistent with what I have urged.

But there is no case to support his doctrine of a retrospect, as he has laid it down.

As to the citation from *Bro. Abr.*—It does not follow “that all other acts of an infant are void.”

The entry (upon an exchange) is not analogous to livery and seisin: an entry upon an exchange does not make a discontinuance.

Partitions by infants are only voidable, not void.

So, leases by infants without reserving rent,

VOL. III.

L 1

1763.
ZOUCH
ex dimiss.
ABBOT and
HALLET
v.
PARSONS.

see 1 Term Rep
161, per Buller
q -

He manifestly meant
7 Ann. c. 19.
V post 1803.

[1800]

1765.
ZOUCH
ex dimiss.
ABBOT and
HALLET
v.
PARSONS.

The law only prevents the infant from being injured. As to the *grant* of an infant.—He may consider it as a *voidable* act: but it is *not a nullity*. And the term “VOID” means only (in several of the cases cited) “that the infant *may avoid it*.”

As to the case of *Thompson v. Leach*—The person who was to avoid the act was the *heir* of the person who did the act.

A release of a right differs from releases which convey interests.

No *stranger* has a right to say “that *John Lamb Cook's* conveyance was a *void* one.”

The act of parliament mentioned by Mr. *Dunning* does not recognize the law to have been as he supposes.

Curia advisare vult.

[1801] Lord MANSFIELD, after stating the case minutely, now delivered the resolution of the court to the following effect.

The merits of this cause turn upon two general questions; 1st. Whether this conveyance is good, and *binds the infant*; 2dly. If it does not bind the infant,—Whether the *defendant* can take advantage of the infancy, and on that account object to it.

1st General question.

As to the first—Miserable must the condition of *minors* be; excluded from the society and commerce of the world; deprived of necessities, education, employment, and many advantages; if they could do *no binding acts*. Great inconvenience must arise to *others*, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their *own benefit*, and, without prejudice to themselves, for the benefit of *others*.

To mention a rule or two: the reasons of which are applicable to the present case.—

If an infant does a *right* act which he *ought* to do, which he was *compellable* to do, it *shall bind him*: as if he makes *equal partition*; if he *pays rent*; if he *admits a copyholder*, upon a surrender. But there is no occasion to enumerate instances: the authorities are express; and the reason decisive—“generally, whatsoever an infant *is bound to do by law*, the same shall bind him, albeit he doth it *without suit of law*.”

• Co. Litt.
172. a.

+ 9 Co. 85. b.

The second resolution in *Conny's* case, † is, “that although the infant in the case at bar was not compellable to attorn, because the minor was not conveyed by fine; yet, because by a *mean*, he was compellable to attorn, scilicet if a fine had been levied, the attornment was good.” *Fortescue* lays it down larger, 18 H. 6. 10.

2 att 35 per
2d Hardwicke

22 Term R 161-

Fonble H 25. 320?
acc: ante 1717.

2. a.—“ He did but that which he ought to do: therefore the attornment is good.”

“ The attornment of an infant to a grant by deed is good because it is a lawful act: albeit he be not, upon that grant by deed, compellable to attorn.” *Co. Litt.* 315. a. The reason is manifest—A right and lawful act is not within the reason of the privilege which is given, to protect infants from wrong. His being compellable by any mean, or in any way to do it, proves the act to be substantially what he ought to do.

In the case of *Holt v. Ward*—The infant's being compellable by the ecclesiastical court would have answered the objection made there, as much as her being compellable by the common law: therefore civilians were heard.

To what end should the law permit a minor to avoid an act, which, in any way, through any mean, by any jurisdiction, he might be compelled to do over again, after it was undone? It would be assisting him to vex and injure others, without the least benefit to himself.

Another rule, which may be collected from the books, is “ that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding:” as, where an infant patron presents, an infant-executor duly receives and acquits, pays and administers the assets; an infant-head of a corporation joins in corporate acts; an infant-officer does the duty of an office which he may hold.

A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is “ that it never shall be turned into an offensive weapon of fraud or injustice.” As where tenant for life and infant in remainder levied a fine,—the infant reversed the fine, as to himself, for the inheritance, for nonage; yet he shall be bound by his assent to the fine and joining in it, not to enter for the forfeiture. And the fine was held good, as to the estate of tenant for life; and reversed quoad the infant only. *Pigot v. Russel*, 2 Leon. 108. *Cro. Eliz.* 124. S. C.

To see whether the reasons of these rules are applicable in the present case, it is necessary to ascertain what is in truth the nature of this transaction.

Part of the personal estate of *William Cook* consisted of 109l. due from *John Bicknell*, secured by a mortgage in fee. His widow and infant-son were joint executors, and residuary legatees; and as such, intitled to this money. The fee which descended to the son was merely as a pledge for the money: besides the money, the infant had no beneficial interest in the land whatsoever. Upon payment, he was bound to convey, as the mortgagor should direct.

Conveying is no more than delivering up a security

1765.

ZOUCH
ex dimissa.
ABBOT and
HALLET
v.
PARSONS.

[1802]
[Strange, 938.]

Fonbl 83, 4 no
Co Lil 89 a, 72
[Dig. l. 50. Therefore
Tit. 17. Reg. an inf
119. No. 4. is
the same ex-
pression. himself
9 Vin. 370. His own
19 Vin. 536. fraud in
(Q) 1. a Conty
3 Co. 78. a Conty
4 Bro. 506. where it is
507.] voidable only.
See 1 Fonbl 83
29: 3227 no

1765. when it is satisfied. The money here was paid to the
 ZOUCH proper hand.
 ex dimiss. * An adult, under the same circumstances, would have
 ABBOT and been guilty of a breach of trust; if he had refused: he
 HALLET would have been compelled to do it, and would have been
 v. condemned in costs for refusing.
 PARSONS. By act of parliament 7 Ann. * the infant was compella-
 * V. c. 19. s. 2. ble to do it, during his minority. (a)

(a) In the preamble to the stat. 7 Ann. c. 19. it is re-
 cited, that " many inconveniences do and may arise by
 reason that persons under the age of twenty-one years
 " having estates only intrust for others, or by way of mort-
 " gage, cannot, though by the direction of the cestui que
 " trust, or mortgagor, convey any sure estates in such
 " lands to any other;" for remedy whereof, it is enacted,
 that " it shall be lawful for any such person under the
 " age of twenty-one years, by the direction of the court
 " of Chancery or Exchequer, signified by order made on
 " the petition of the person for whom the infant shall be
 " seised, or possessed in trust, or of the mortgagor or
 " guardian of such infant, or person intituled to the
 " money; secured on any lands whereof any infant is
 " or shall be seised or possessed by way of mortgage, or
 " of the person intituled to the redemption thereof to
 " convey such lands as the court of Chancery or Exche-
 " quer shall direct; and such conveyance shall be as
 " effectual as if the infant were of the full age of one and
 " twenty years; and it is thereby further enacted that all
 " such infants being only trustees may be compelled as
 " aforesaid to make such conveyances."

Now it is plain that before that act an infant could not
 have made such conveyance as in this case, and he is
 only enabled to make it by that act, *by direction of the
 court of Chancery or Exchequer*, and therefore cannot make
 it without such direction; for his conveyance when not
 warranted by that act, as it was not in the present case,
 remains as it was before the act; that is, as appears by
 the preamble of the act, as well as from clear legal prin-
 ciples, that his conveyance does not pass any *sure estate*,
 to use the words of the preamble: that is, his conveyance
 is *voidable* at best, and in some cases it was void: conse-
 quently the infant having entered to avoid the estate, was
 legally intitled to recover; and whether he might not after-
 wards have been compelled in a court of equity to convey,
 might depend upon circumstances; but substantiating
 his conveyance is depriving infants of the protection the
 legislature intended for them; by confining their acting
 to the directions of the Chancery or Exchequer, and it is

It is much *stronger* here, that the money was *paid by the plaintiffs*; who, upon the faith of this conveyance, and the title deeds produced by *Bicknell* the mortgagor, advanced *more money*.

The *whole beneficial estate* belonged to *Bicknell*, after paying the 109l. The infant's conveyance was matter of *form*, and in the nature of an *authority*, executed by *Bicknell's* direction, in favour of a third person who ventured his money upon the faith of it.

It would be *iniquitous* in the infant, to avoid it: it would be *unjust*, to set up the privilege, to make an innocent man lose his money, circumvented by his confidence in the infant's concurrence.

But it could not even have that effect. It would be nugatory, and without any effect. For, if it was avoided, he must make the same conveyance over again: he would be *compelled* to do it. A conveyance to the *defendant* would be a breach of trust.

By the case stated upon the *first trial*, it did not appear that the infant's conveyance was a right act; such as he ought, and was compellable to do. The court then ordered a new trial, to get a more correct state of the case.

Upon the *second trial*, it now comes out clear, that the infant was expressly a *trustee for the plaintiffs*. He was *paid* by them: upon the faith of the fee being in *him*, they advanced *more money*.

If the fee was in a *stranger*, the plaintiffs have the *prior* equity. If *Thorne* had been prior; his letting the mortgagor have the title-deeds, might be sufficient to *postpone* him. And the defendant had express notice.

There can be no doubt that the infant was compellable to do what he has done.

Upon the first question, we are all of opinion; "that this conveyance binds the infant." [1804]

But supposing it not binding against him, or those who may stand in his place—

The second question is, "whether the defendant can take advantage of the infancy; and, on that account, object to the conveyance."

This depends upon two points; 1st. "Whether this conveyance be void; or voidable only." 2dly. If voidable only, "whether the infant, by his entry before the assizes, had absolutely avoided it."

It is not settled, what is the *true ground* upon which an infant's deed is voidable only:—Whether "the solemnity of the instrument is sufficient;" or "it depends upon

making good a conveyance which is not so either by common law, or by this or any other act of parliament.

1765.
ZOUCH
ex dimiss.
ABBOT and
HALLET
v.
PARSONS.

* See the beginning of this case.

[1804]

2d General question.

1765.
ZOUCH.
ex dimiss.
ABBOT and
HALLET
V.
PARSONS.
1st Point of
the second
general ques-
tion.
† Sect. 12.

"the semblance of *benefit to the infant*, from the matter of the deed upon the face of it."

As to the first, the *solemnity of the instrument*—We think the law is, as laid down by Perkins †—That "all such gifts, grants or deeds made by infants, which do not take effect by *delivery of his hand*, are void: but all gifts, grants or deeds made by infants, by matter in deed or in writing, which *do take effect* by delivery of his hand, are *voidable*, by himself, by his heirs, and by those who have his estate." The words *which do take effect* are an essential part of the definition; and exclude letters of attorney, or deeds which delegate a *mere power* and convey *no interest*.

In Bro. Abr. Title "*Dum fuit infra Etatem*" pl. 1. (which cites 46 Edw. 3. 34.) It is noted "that a *Dum fuit infra Etatem* was admitted to lie of a rent: and yet by some, the grant of an infant was void and not voidable." But (says the book) "it is not so: for then this action would not lie. And besides, the *delivery* of a deed can not be void; but only *voidable*."

There is no difference, in this respect, between a *feoffment*, and *deeds* which convey an *interest*. The reason is the same.

The *delivery of the deed* must be in the presence of *witnesses*, as much as the livery of seisin. The ceremony is as solemn. The presumption "that the witnesses would not attest, if they saw him an infant," holds equally as to both.

[1805]
* Sect. 259.

Littleton, who writes with great accuracy and precision, puts them both upon the same foot. He says "If before the age of twenty-one, any deed or feoffment, grant, release, confirmation, obligation or other writing be made by any of them, &c. all serve for nothing, and may be avoided."

In 2 Inst. 673. a bargain and sale inrolled by an infant is denied to be matter of record which the infant must avoid during his *minority*: but the book says, "he may avoid it, *when he will*."

An infant, or they who stand in his place, *can not* plead "*Non est factum*," and give the infancy in evidence; but they must plead the infancy *specially*, to avoid the deed: and that plea avoids it, by relation back to the *delivery*. The reason of this is, because it has an *operation* from the *delivery*; and not because it has the *form* of a deed.

The deed of a *feme-covert* has the *form*: but she may plead "*Non est factum*," because it has *no operation*.

The distinction between the deeds of *femes-covert*, and of *infants*, is important: the first, are *void*; the second *voidable*.

Perkins 12. Newland 11.

Perkins, sect 154.* says—"And it is to be known, that a deed can not have and take effect at every delivery, as a deed: for, if the first delivery take any effect, the second is void--As in case an *infant* makes a deed, and deliver the same as his deed, &c. and afterwards, when he comes of full age, delivers it again as his deed; this second delivery is void. But if a married woman deliver a bond unto me, or other writing, as her deed; this delivery is merely void: and therefore if after the death of her husband, she, being single, deliver the same again unto me, as her deed; the second delivery is good and effectual."

Two objections were made at the bar, to this proposition; at least, in its extent. 1st. That leases by an infant, by deed, upon which no rent is reserved, are absolutely void; therefore the criterion, "whether the deed is void or voidable," does not depend upon the delivery; but upon the matter and contents—"Whether it may possibly be for the infant's benefit." 2dly. A surrender by an infant, by deed, is absolutely void: therefore all deeds are not voidable only.

As to the first—There are many obiter sayings; but there is no sufficient authority, clearly to outweigh the reasons against this position: I cannot find a case adjudged singly upon this ground. What looks the likeliest to an authority, is the opinion of *Wray* and *Southcote* against *Gawdy*, in *Humphreston's case*, 10 Eliz. Moore 105, and 2 Leon. 216: * But there, the judgment was upon the right and merits of the case, and not upon the point of the lease. The question, as to the lease, arose upon the fictitious lease to try the infant lessor of the plaintiff's title in ejectment. The two (*Wray* and *Southcote*) held "that no rent being reserved, there was no semblance of benefit to the infant." Whereas, in truth, it was greatly for his benefit. The objection was turning his own privilege of infancy against him, to bar his recovering. Besides, the lease was by parol.

But reason soon prevailed; and it has been long settled, that an infant may make a lease, without rent, to try his title. Very prejudicial leases may be made; though a nominal rent be reserved: and there may be most beneficial considerations for a lease though no rent be reserved.

What seems decisive is, "that the lessee can, in no case avoid the lease, on account of the infancy of the lessor:" which shews it not to be void, but voidable only. And it is better for infants, that they should have an election.

1765.

ZOUCH

ex dimiss.

ABBOT and

HALLET

v. PARSON.

* Title, Faints;

p. 32.

Prop 24.

[1806]

* V. also S. C.

in Benlo. 195.

Owen, 64.

Dyer, 337 a.

[9 Vin. 386.

pl. 70.

Noy, 130.]

[2 Sider. 110.

(arc. and

Noy, 130.)]

43 ac Abell hit

Leases 131 marg

that mfts (m

are in general

only voidable

see 1 Ford & Tr

29 3 228002

1765. As to the second—The authority of † *Lloyd v. Gregory* was cited: and sayings *arguendo*, in † *Thompson v. Leach*.
 ZOUCH. ex dimiss.
 ABBOT and Hallett v. PARSONS. † *Lloyd v. Gregory* is reported in Cro. Car. 503 and Sir William Jones, 405 and is abridged in 2 Ro. Abr. 24. title "Faites," letter I. pl. 6. and 495. title "Surrender," letter F. pl. 7. and in 1 Ro. Abr. 728. title "Enfants," letter B. pl. 2. and 3.
 Carthew, 211. 435. Equity Cases, abridged, p. 278. pl. 3. 3 Salk. 300. 12 Mod. 173. and Holt. 357. 623.

The case of *Lloyd v. Gregory* was determined upon the special verdict, by three judges; of whom, Sir William Jones and *Croke* were two.

Sir William Jones reports, "that the second lease being void made an end of the question; and that the judges gave no opinion upon the other points."

* Cro. Jac. 503.

[1807]

* Pl. 3.

The note in *Croke** does not say a word of the only ground of the judgment; but rather supposes the second lease good, by arguing, "that there being no increase of term or diminution of rent, it had no semblance of benefit." *Croke's* note might be confounded with what passed upon the trial at bar: for *Roll* states sayings to that effect upon the trial at bar. 1 Ro. Abr. 728.*

But Sir William Jones is certainly right: for the second lease was void. And no surrender, express or implied, in order to, or in consideration of a new lease, would bind; if the new lease is absolutely void: for, the cause, ground, and condition of the surrender fails.

† 8 Co. 43. H. 45 Eliz.

In *Thompson v. Leach*, (which was a most favourable case for the plaintiff,) much is said, in argument, "to prove the surrender of an infant or lunatic to be void;" to get rid of some doctrine laid down in *Whittingham's* case,† "that the remainder-man, injured by the act could not avoid it." But more is said to overturn that doctrine. There is no difference, in this respect, between the heir in tail and the remainder-man: neither claims under him whose act is in question; but both claim *per formam doni*.

† In Darcy v. Jackson (to the 3d point of that case.

In *Palmer*, 254, † *Dodderidge* denies the doctrine; and says, "he in remainder, and the donor, shall take advantage of infancy;" which is agreeable to *Littleton's* reasoning, § 635—"It should seem against reason, that a feoffment made by an infant shall grieve or hurt another, to take from them their entry, &c."

Suppose the comparison between an infant and a man non compos just, (which it is not,) the point of "the surrender being void or voidable" was not necessary to the judgment in that case.

1 Foal 73.
 See 3. 110 d 30.
 Powdell 32.
 contra
 but see 1 Woodm 411, 2 acc.

I know of no judgment, upon the ground "that such a surrender is void." Most undoubtedly, the *other* party can not say so. If an infant was to surrender an unprofitable lease; and, after acceptance, the premises should be burnt, overflowed, or otherwise destroyed; the *lessor* never could say the surrender was void. There is no instance where the *other* party to a deed can object, on account of infancy. Consequently, the infant may let the surrender stand, or avoid it: which proves it to be voidable only.

If a new case should arise, where it would be more beneficial to the infant, "that the deed should be considered as void;" if he might incur a forfeiture, or be subject to damages, or a breach of trust, in respect of a third person, unless it was deemed void—; The reason of the privilege would warrant an exception, in such case, to the general rule.

Powers of attorney are an exception to the general rule, as to deeds; and a power to receive seisin is an exception to that. The end of the privilege is "to protect infants." To that object, therefore, all the rules and their exceptions must be directed.

But be the point upon the solemnity of the delivery, as it may, (for there are respectable sayings the other way;) it is not necessary to our determination. For we are all of opinion, "that the 109l. received, and the other circumstances of the transaction, shew a semblance of benefit, sufficient to make it voidable only, upon the matter of the conveyance."

If it be voidable only, the second point is, "whether the infant, by his entry before the assizes, (which appears to be during his minority,) has avoided it."

At the common law, the only conveyance in pais, of the freehold and inheritance of land, with transmutation of possession, was by feoffment. If it was tortious, the disseisee was obliged to enter, to revest his possessory title: and then he might bring an action of trespass. So, in the case of feoffments by an infant: he might enter during his minority, to revest his possessory right, for the sake of the profits; but still the feoffment was voidable only: and he might elect to confirm it, when he attained his full age.

The reason why an infant cannot bring any writ analogous to a *dum fuit infra etatem*, during his minority, is, that his election may not be found by the judgment.

Whether an entry be of any use in the present case, is not material: it is sufficient, that it cannot have any larger effect, than in the case of a feoffment. The infant is alive, still a minor. The defendant cannot elect for

1765.

ZOUCH,
ex dismiss.
ABBOT and
HALLET
v.
PARSONS.

[1808]

1 Hen 3d Ca 5

2d Point of
the 2d general
question.

1765.
ZOUCH,
ex dimiss,
ABBOT and
HABLET
V.
PARSONS.

[1809]

him: he is a *mere stranger*, in every view; and has no estate affected by the conveyance.

We are all of opinion, "that the *plaintiffs ought to recover*." And it is well for the defendant, we are of this opinion. He would get nothing by defeating the plaintiffs, *here*: for, finally, in *another* mode of proceeding, the conveyance must be *confirmed*, and the defendant would be to pay all the *costs* here and there.

It is fortunate for the suitors on both sides, when, consistent with rules and forms of proceeding, *that justice*, which must be the *final* determination of the question, may be done in the *first* stage of the litigation.

The consequence of what has been said, is, that

The *POSTEA* must be delivered to the *PLAIN-
TIFFS*.

PETER GANDER'S CASE.

Party in a
lock-up house
not considered
as in actual
custody under
an insolvent
act.

† 1 G. 3. c. 17.

ON a motion made by Mr. Jones, and supported by Sir *Fletcher Norton*,

The question was, "whether a person was intitled to "be discharged under the late † insolvent debtor's act;" whose case was this—

The man was *not* in the *actual custody of the gaoler*, on the day specified in the act; but was in the custody of an *officer*, in a *house of safety* (a spunging-house.) He was *not* included in the *first* part of the *gaoler's list*: but he was in the *second* part.

The court of sessions of *London* had holden him *not* to be intitled to his discharge, as an object of this statute.

Lord MANSFIELD inclined, that the sessions were in the right; as this was a positive law. And the jurisdiction is given to the quarter-sessions: so that there seems no way of coming at it, if they were wrong.

The Recorder was very candid, in offering to come into any method that could be thought of. But

Per Lord MANSFIELD—We can do nothing in it.

Monday, 25th Nov. 1765. REX versus THOMAS ROGERS, SAMUEL MATTHEWS, and JOHN KING.

Identity of the
person of a
felon to be
tried instant.

THE defendants were brought to the bar, upon the returns of two writs of *habeas corpus*; the two former, from *Winchester* gaol; the last, from *Maidstone*.

They were the felons who broke out of *Maidstone*.

gaol, last summer, after having first murdered *John Fletcher* the gaoler, &c. and became a terror to the neighbouring country, for a considerable time.

The respective writs and returns were read: by which it appeared that they were in custody upon convictions of *felony* for highway-robberies; and detained upon warrants from the coroner of *Kent*, on inquisitions found for wilful murder.

Then the *certioraris* and returns of the respective convictions for felony in committing highway-robberies were read. It appeared, that *Thomas Rogers* had been capitally convicted of felony for a robbery upon the king's highway: and sentence of death passed upon him: and that *Samuel Matthews* and *John King* had also been capitally convicted for a highway-robbery; and sentence of death passed upon them likewise, for the same.

Mr. Attorney General prayed that they may be asked "what they had to say why the court should not proceed to award execution against them upon these attainders for the said felonies."

Accordingly, they were respectively asked that question.

Thomas Rogers, being first arraigned, *denied* the *IDENTITY*: and the Attorney General averred it. Whereupon a jury was immediately impanelled and sworn.

Rogers prayed the assistance of *counsel*; and desired the court to name one for him: but afterwards, he himself named Mr. *Dunning*.

Proclamation was made: and the indictment read.

N. B. The two others were permitted to sit down, whilst this issue was trying.

Then Mr. *Bariow* (Mr. *Athorpe*, secondary of the Crown-office being absent,) charged the jury with the present issue upon the *identity* of *Thomas Rogers*.

The identity was clearly *proved*: and the jury found him to be the man.

Mr. *Dunning* asked, "whether he was intitled to a [1811]
"copy of the record."

THE COURT answered, no: it was refused in Mr. *Charles Ratcliffe's* case.*

Mr. Justice *WILMOT*, (the second judge) pronounced the award of execution upon the former sentence (for the felony and robbery.

Then *John King*, being called upon in the same manner, denied the identity: and the Attorney General affirming it, issue was joined as before.

Mr. *Dunning* was, at the prisoner's desire, assigned his counsel. He asked time, to take instructions from his client. But

1765.

REX

V.

ROGERS

and others.

*It was so, (on

24th Nov.

1746. M. 20

G. 2. B. R.)

It was also re-

fused to Roger

Johnson.

Mich. 1727.

2 Geo. 2. B. R.

1765.
 REX
 v.
 ROGERS
 and others.

THE COURT denied it; as there was no pretence for it, nor could it be of service to the prisoner. Mr. *Rudcliffe's* case was very different from this. There was, in that case, a doubt how he should plead; whether the non-identity, or the act of grace: but in the act of grace, there was an exception of persons who had broken out of gaol; (which Mr. *Rudcliffe* had none.) Such issues are to be tried *instanter*: indeed the court *may*, upon circumstances, give time. But here is no sort of pretence for it.

The jury was sworn, and charged; proclamation made; and the identity clearly proved and found, as before.

Mr. Justice WILMOT awarded execution, as before.

Samuel Matthews being called upon, denied the identity; which was averred by Mr. Attorney General: and issue was joined. The same counsel was desired and assigned; and the same jury sworn, and charged; and the same form repeated, as before.

But when the cryer was beginning to make proclamation,

THE COURT stopped him; saying that this proclamation was improper.

The fact being proved; and the identity found;

Mr. Justice WILMOT awarded execution according to the former judgment and sentence: as he had done against *Rogers and King*.

[1812] Mr. Attorney General then prayed execution; and that a particular day might be fixed; and that *Maidstone* might be the place, (at the request of the county.)

THE COURT were of opinion, not only that it was not incumbent upon *them* to name the day; but even that it was more proper for *them* not to do it. It is not usual at the assizes. The sheriff will do as he thinks proper. There must be a *rule* "to deliver those two that came from *Winches'er*, to the custody of the sheriff of *Kent*, being present here in court."

* Sir Richard Beltenson, bart. was the sheriff, and was in court.

Take the prisoners from the bar.

Memorandum—

These desperate fellows remained *chained* together, during this whole proceeding.

Tuesday, 26th
 Nov. 1765.

[S.C. 1 Bl. 579.]

Information quo war. will not lie for encouraging the exercise of a franchise.

REX *versus* MARSDEN, et al'.

ON Tuesday, 12th of June last, Sir Fletcher Norton moved for an information in nature of *quo warranto* against the defendants for holding a public FAIR or MARKET, at *Wakefield* on every other Wednesday. He had moved it a day or two before: but the court

had some * doubt "whether such an information would " lie;" viz. an information in the nature of a *quo warranto*, in the name of the *clerk of the crown*, at the application of a *private* person.

He therefore now endeavoured to shew, that the court had, both upon *principle* and *precedent*, a *power* to grant such an information: and he cited several cases; particularly, 1 *Salk.* 376. *Rex v. Mayor and Aldermen of Hertford*, and 2 *Hawkins, P. C.* 262. *sect.* 7. to shew that all informations in nature of *quo warranto* are within 4 & 5 *W. & M. c.* 18. and the same book and page, *sect.* 9th, to shew that fairs and markets are franchises that concern the *public*: and that an information in nature of *quo warranto* will lie in such case: though not for setting up a warren, which is wholly of a private nature. And therefore this case is not like Sir *William Lowther's* case in 2 Lord *Raymond*, 1409. or Lord *Lisburn's* case there cited; both which were for setting up warrens. And he said the 9 *Ann. c.* 20. had no relation to this sort of informations; it relates only to *corporate* offices.

He also cited a case of *Rex v. Daffey et al.* *M.* 32 *G.* 2. *B. R.* and another, of *Rex v. Griffith, Dixon, et al.* *P.* 18 *G.* 2. *B. R.* The former, he said, was for holding a market in *Chester*: the latter, for holding a market at *Broseley* in *Shropshire*; where the rule to shew cause was made absolute. (It was *Rex v. Wilkinson and three others.* *V.* post 1818.)

THE COURT thereupon gave him a rule; which was drawn up in this form, viz. "to shew cause why an " information in the nature of a *quo warranto* should not " be exhibited against these persons, to shew by what " authority they hold, or *promote and encourage* the holding of a public show, fair, market or sale at a place " called *Wakefield Luge* within the town of *Wakefield*, in " the county of *York*, ou every other *Wednesday* throughout the year, or upon any particular *Wednesday*, for " the exposing to sale and buying and selling all sorts of " cattle, goods, wares and merchandizes."

Upon shewing cause now, the counsel for the defendants were Mr. *Wedderburn*, Mr. *Serjeant Burland*, Mr. *Stowe*, and Mr. *Wilson*; and for the rule, Sir *Fletcher Norton*, Mr. *Fearnley*, Mr. *Dunning*, Mr. *Lee*, and Mr. *Wallace*.

(a) From a MS. note of this case it appears that the information was granted against some of the defendants, though as to others discharged; and it could not have been granted against any, if the subject had not been proper for such an information.

1765.

REX
V.MARSDEN,
et al.'* N.B. The
like motion
had been
twice denied.
Rex v. Owen
et al'. upon

the first motion, in H.

12 *G.* 2. and
*Rex v. Anderson, M.*14 *G.* 2. for
holding a
market atHawcliffe in
Yorkshire. (a)3 *Nov*
127.
13 ac 26
Fair A.

[1813]

[See 2 *Ventr.*
344.5 *Durn.* 377.
4 *Durn.* 241.]

1765.
 REX
 v.
 MARSDEN,
 et al.

The counsel for the defendants said, that as to any private injury the prosecutor may have suffered—he *had taken his remedy, by action.*

(And it appeared that ACTIONS had been brought, and were now depending.)

And as to the *prerogative of the crown*—The *Attorney-General* is to judge of that. And he will choose to act with caution; if he attends to 2 *Inst.* 282. or the statute of *Gloucester*. The abbot of *Fischamp's* Case, there cited, is very strong, to shew the danger to the officer of the crown from his interfering; for *William de Penbrugge*, king's attorney, was committed to gaol for prosecuting that *quo warranto* without a precept.

This case is not within those misdemeanors which the act of 4, 5 *W. & M. c.* 18. meant that the court should interfere in. And it is not within 9 *Ann. c.* 20: for it is not a franchise in a *borough or corporation*. Indeed, there [2 Show. 201.] is not any claim of any franchise at all: no demand of toll; no clerk of the market; no court of piepowder. It is only a private transaction; a sale here would not be within the protection of a market overt. It can not be an usurpation upon the crown, without a demand of toll. 2 *Show.* 201. *Tremaine* 449. *S. C.*

[1814] They mentioned *Rex v. Sir Thomas Raynell*, 2 *Sir J. S.* 1161. *Rex v. Wilkinson*, 18 *G. 2. B. R.* and *Rex v. Mary Daffry*, 21 *G. 2. B. R.*

This is an application by Mr. *Scot*; who pretends to receive a private injury. But, in fact, he is not injured.

Wakefield is a much more convenient place for this purpose, than *Adwalton* is, where the prosecutor has a market; if it was not so, it would sink with its own weight. And it is no injury to the proprietor of *Adwalton-market*. In discussing which assertion, he cited *Briton*, 159. *cap.* 63. and *Bracton*, fo. 235. c. 46. "*Si mercatum aliquod levatum sit, ad nocumentum vicini mercati.*"

The counsel for the prosecutor observed that the defendants had made two objections: 1st. That the usurpation of a fair or market is not, in general, a ground for the interposition of this court, by way of information in the nature of a *quo warranto*; and 2dly. That the present case, in particular, does not afford a foundation for such an information.

To which they answered—1st, The court will always grant such an information where there is an usurpation upon the crown, by which the public may suffer: though if it be a mere usurpation upon the crown, they will leave it to the care of the officer of the crown; the king's attorney-general.

Here, the public are greatly interested. Fairs and markets concern the trade and commerce of the kingdom;

and the crown can not grant one without previous steps; an *ad quod damnum*, &c.

As to 4, 5 *W. & M. c.* 18—It extends to *all* informations; to informations in the nature of *quo warranto*, as well as others.

The case of *the Company of Merchants Adventurers v. Rebow*, in 3 *Mod.* 126. 2 *Jac.* 2. 1686. shews that these informations were grantable before that act.

As to *instances*—It falls within the general rule of granting informations where the government or the public are concerned. *Rex v. Wilkinson*, P. 18 G. 2. B. R. for holding a fair at *Broseley* in *Shropshire*, is a precedent: *cause* was *shewn*; and the rule made absolute. *Rex v. Mary Daffey*, M. 32 G. 2. B. R. for holding a market in *Chester*.

The cases of *Rex v. Sir Thomas Reynell*, in 2 *Str.* 1161. [1815] for setting up a ferry at *Laleham*, and *Sir William Lowther's* case in 2 *Lord Raym.* 1409. taken together, shew that the question turns upon its being of a private nature, or not. The distinction is between *public* and *private* injuries. And this distinction was antecedent to the acts of parliament of 4, 5 *W. & M.* and 9 *Ann.*

Markets and fairs are of a most *public* nature: and somebody ought to be *answerable to the public*. Whereas here is *no check* at all; no authorized *regulations*, even by their own confession: and there ought, in all markets, to be the *privilege and protection of a market overt*.

The 2d objection depends upon *facts*.

All that promoted and encouraged this illegal act are liable to an information for convening and holding this *unlawful assembly* which is a *market* in all respects, but those in which it *ought* to be one. Mr. Serjeant *Hawkins* is of opinion, "that these public meetings, &c. are not justifiable."

Toll is *not incident to a fair or market*. However, } *Geo 2d*
here it is sworn "that they *do collect duties*;" and this is not denied, "that they have collected *stallage* or *pen-nage*." So that if they do not meddle with the *onus*, they take the *commodum*. If they can do this, there is an end of any more grants from the crown of fairs or markets.

If it is so convenient; let them apply for a legal grant, and take the proper steps.

The *action* is brought by the owner of another market, for a *private* injury: this information that we pray is *diverso intuitu*, for a *public* offence and usurpation. However, the *action* is *dropped*; it is discontinued: but if it subsisted, it would be an *inadequate* remedy.

Lord MANSFIELD—If it were necessary to determine "whether the court *could* grant an information for

1765.

REX
v.
MANSDEN,
et al.

1765.

REX
v.MARSDEN,
et al.

• V. 4, 5 W.

& M. c. 18.

V. also 9 Ann.

c. 20. s. 4.

[1816]

+ 1 Salk. 374,

376.

"holding a fair or market," I should desire time to consider: for, it does not sufficiently appear, whether *before* the * act, the king's coroner and attorney *could* file such an information. If he could, the power is *not taken away* from him to do it now by leave of the court: if he could *not*, it is *not given* to him.

In the case first cited, † it appears that this court, in 12 W. 3. *before* the act of 9 Ann. granted an information in the nature of a *quo warranto*. And *if* they did it in *one* case, they may in *others*. The court (taking that power for granted) held that the king's coroner and attorney ought to take a recognizance; and set aside the process, for want of one. But *if* he could *not* file such an information *before*, it would be going very far, to say "that *that* act gave him the power of doing it."

+ V. 2 Sir J. B.
1161.

Rex v. Sir Thomas Reynell, in *Strange*, † is a very short note. But no case or even *dictum* appears, or any instance, where the coroner and attorney did file these informations *before* the act of 4, 5 W. & M.; nor by the records of the office, is there any sort of proof of it, therefore I should desire the records to be searched, *if* it were necessary to form an opinion on *that* point. But that is not, at present, necessary; because I think this rule ought to be discharged on *another* point.

Therefore on the former point, I give *no opinion*, nor have *formed* any.

But as to the second—*Upon the circumstances* of this case, I am clear that there *ought not* to be an information in the nature of a *quo warranto*.

This rule is drawn up, "that the defendants shall shew cause why they hold, or encourage and promote the holding a fair or market."

Now though it were admitted, that an information in the nature of a *quo warranto* might go, to put the defendant to shew by what *title he holds it*; and that therefore the former part of the rule might be right; yet a *quo warranto* will not lie for *encouraging and promoting* the holding one. Therefore the rule ought to have been drawn up in *this form*. Here, all the defendants are *only* encouragers or promoters: no one is charged with actually holding a *market or fair*, or with claiming to hold one. There are no marks of a fair or market; no toll claimed or taken by the lord of the soil. The defendants are only guilty of a *misdeemeanor*, at the most: there is no usurpation of a franchise.

Therefore this rule ought to be discharged.

Mr. Justice WILMOT said, he should doubt much if an information in the nature of a *quo warranto* could lie, upon a *private* application, for this usurpation upon the crown; because the defendants could have no costs beyond the 20l.

However, he gave no *opinion* on this head.

The reason why a fair or market can not be holden without a grant, is not merely for the sake of promoting traffic and commerce; but also, for the like reason as in the *Roman* law, for the preservation of order, and prevention of irregular behaviour; "*ubi est multitudo, ibi debet esse rector.*"

Therefore this is not a question "whether this is or is not a *legal* assembly:" (that is a very different question.)

The present question is "whether the crown's name can be made use of at the *instance of a subject*, for this particular purpose."

The *immediate* injury is to the *crown*: the rest is *consequential*.

The old writ of *quo warranto* is a *civil* writ, at the suit of the crown: it is *not a criminal* prosecution. It probably dropped with *aïres*: which is the more likely, because the *quo warranto* was to be determined *in aïre*. But be that as it may, this was the true *old* way of inquiring of usurpations upon the crown, by holding fairs or markets; *viz.* by writs of *quo warranto*.

Then informations in the nature of a *quo warranto* came into use and supplied their place.

In all the cases I could find, (and I searched all that I could meet with,) *all* informations of this sort were filed by the attorney general; *none* by the king's coroner and attorney. And this is natural, and easily to be accounted for; because it is a *private* right of the crown.

How then could the statute of 4, 5 *W. & M.* alter this? That act was made to *prevent* the master of the Crown-office from vexing and oppressing the subject; and intrusted *this court* with the power of inspecting the filing of informations, and seeing that he did not exercise his power to the oppression of the subject, or without sufficient ground and foundation. So that that act was made to *check and control* the power of the master of the Crown-office; not to *GIVE* him a right to exercise a power which he *never exercised before*: quite the *contrary*. It is contrary to all principles, to suppose that he should have such a power. Even *this court* can have no authority, but by common law, or prescription, or by act of parliament.

How came, then, the case of *Hertford* * to extend the recognizance to these cases of informations in the nature of *quo warranto*? This case I own is a great authority; and staggers one: *otherwise* I should have had no doubt about it. And I think that *that case* ought to be carried no further than to CORPORATION-offices.

If any cases are to be found between 4 & 5 *W. & M.* and Vol. III. M m

1766.

REX
V.
MARSDEN,
et al.

[1818]

* 1 Salk. 924.
Rex v. The
Mayor and
Aldermen of
Hertford.

1766.

REX
v.MARSDEN,
et al.

† This case
was deter-
mined upon
Monday, 20th
May, 1745.
by Ld. Ch. J.

Lee, Mr. J. Denison, and Mr. J. Foster. No toll was there taken or demanded; nor did any particular person claim the right of holding a market. Yet the court were unanimous in making the rule absolute for the information: and Ld. Ch. J. Lee cited a case of *Rex v. Browning, et al.* for erecting a skin-market at Smithfield Barr, as a strong case in point.

9 *Ann.* where the master of the Crown-office has exercised this power, they will only prove that he had exercised that authority *before* 9 *Ann.*

But I find no cases that have any weight with me, upon the present occasion. *Rex v. † Wilkinson and others* was clearly chargeable with an inaccuracy; it was issued as upon 9 *Ann.*; which it ought not to have been: and it was *without argument*; at least, *this point was not debated*. The other case (*Rex v. Mary Duffey*) was only a rule to shew cause.

If this matter had depended upon the *former* point. I should have desired time to consider upon so important a point.

But on the *second* point, what my Lord *Mansfield* has said, is decisive.

Erecting a warren is a *misdemeanor*; yet not within the act: therefore *all* misdemeanors are *not* within it.

If an action is not yet brought, or does not go on; yet an action *may* be brought, in future.

The crown will not grant a fair or market, without an *ad quod damnum*. And if the crown do grant one, yet the owner of another market may bring an *action*, or obtain a *scire facias* against the grant.

[1819] This is only a *private* dispute between two private persons about holding this market; which affects, in interest, the market of the other person: it is a dispute about a *private* property, confessedly. Are we, then, to interpose, as for an usurpation of a franchise upon the crown? Here is *no claim of a franchise*. The *pennage* is only taken *ratione soli*.

This has not all or any of the great badges of a fair or market; no court of pie-powders, no clerk of the market, &c. No person now before the court *claims* such a franchise. Therefore there is no reason for us to grant this information.

Mr. Justice YATES—The first point is a question of infinite moment; “whether an information in the nature of a *quo warranto*, for usurping a fair or market upon the crown, can be granted upon the *application* of a *private* person.”

In informations in the nature of *quo warranto*, there is a punishment for the *misdemeanor*, and also a judgment of ouster of the *franchise*.

A private person may indeed apply, as for the *misdemeanor*: and every usurpation of a franchise is a *misdemeanor*. Therefore I should concur, as to this, in the case of *Hertford*: and with the leave of the court, an information might, I think, be granted for the *misdemeanor*.

1765.

REX
V.MARSDEN
et al.'

But can a *private* person thus call upon another man to *shew his title*, where there is no mixture of *criminality*?

This might be attended with very bad consequences. It might be prejudicial to the crown, by collusion; and it would furnish the subject with means of oppression: and the defendant could have no costs beyond the 20l. Which, in a *quo warranto* information, is an inconsiderable sum; though it may bear some proportion to the costs of an information for a *misdemeanor*.

The statute of 9 *Ann.* extends *only to corporation-offices*: a fair or market is not within the intention or construction of that act.

But I give no *fixed or determinate* opinion upon this [5 *Durn* 377.] first point; and only throw out what strikes me at present.

On the second point, he concurred with Lord *Mansfield* and Mr. Justice *Wilnot*.

Mr. Justice *Aston* did not think proper to give an *opinion* on a question not necessary to be now determined; and where the proper persons are not before the court.

The crown might bring a *quo warranto*; or the subject, [1820] an assize of damages.

But he would give no opinion, he said, " whether the subject can demand of another person to shew his title to hold a fair or market, in *this* method of application."

He added this further—I find I have a case that has not been mentioned before: it was in 14 G. 2. *B. R. Rex v. Owen et al.* ‡ Where an information in nature of a *quo warranto* was prayed for holding a market at *Llanbrinmair*; in which, this point was much discussed, but not settled.

‡ I have very full notes of that case. It was first moved and denied in H.

1738. 12 G. 2. It came on again, in Trin. 1739. 13 G. 2. and a rule made to shew cause. It came on again in P. 1740. 13 G. 2. and again in H. 1740. 14 G. 2. when the rule was (of course) made absolute against several of the defendants who neglected to shew any cause; but was discharged as against Mrs. Owen and her son; because they had neither taken toll, nor set up or encouraged the market, nor pretended any right to a market, but, on the contrary, disclaimed it. The rule in *Rex v. Peele, et al.* H. 10 G. 1. and the rule in *Rex v. Browning et al.* Trin. 10 G. 1. were there produced; both which were made absolute. They were for setting up skin markets in Smithfield.

The taking *pennage* weighs nothing with me; because the owner has a right to the *soil*.

1765.
 REX
 v.
 MARDEN,
 et al.

I have no notion that 4, 5 *W. & M.* can EXTEND the power of the master of the Crown-office. It is *restrictive* of his filing oppressive or malicious informations: and the court have, since that act, always *refused* to grant informations for *trifling* batteries or misdemeanors.

But what guides me in the present case is, that there is not a sufficient *claim of a right* of holding a market or fair charged upon the defendants, by any thing that has been laid before the court. And I think (with Lord *Mansfield*) that the rule ought not to have been drawn up as it is.

Therefore he concurred.

+ 23 G. 2. qu.

Sir *Fletcher Norton* was not satisfied with what seemed to be the court's opinion on the 1st point; and mentioned a case of *Rex v. Gouge*—† for holding a court-leet. And he said he believed there were several such informations granted by the court, in cases not within 9 *Ann*, c. 20.

[1821]

LORD MANSFIELD—Any one case of the court's granting such an information *before* the statute would be material: so are all those granted *since* the statute, if not within the reason of the *Hertford* case. That case goes upon the supposition, that there was no other way to try it, nor to redress the parties concerned. So does the case in *Strange*, and a constable is within the same reason.

But Mr. Justice WILMOT, said he did not see that these cases were conclusive; because he thought that such informations seemed confined to usurpations upon the crown. He said, he remembered an information applied for litigated, about a tumultuous assembly at *Brentwood*. He also remembered *Rex v. Oxen*:† it was moved by Mr. *Wilbraham*.

† See his report of it, *infra*, and in next page, (1822.) and my note of it, *ante*, 1820. in the margin.

LORD MANSFIELD—If the court *can* do it, then it must depend upon the *circumstances* of the *particular* case.

It is said, that in 23 G. 2, an information in the nature of a *quo warranto* was granted for holding a court-leet. Now this is very material: for the case of holding a leet is no more within 9 *Ann*. than the present case is.

It was agreed on all hands, that an *action* would not be an adequate method of determining the *merits* of the question between the parties.

Upon the whole—

The JUDGES all declared expressly, that they were *far from giving any* OPINION one way or another upon the *first* point; but meant to let it remain *open* to any future light that might be procured upon the subject, by cases or precedents or otherwise, and particularly by searches after what the master of the Crown-office had

done in these cases, *before* the two acts of parliament of 4, 5 W. & M. and 9 Ann.

As to the second point—They were clear and unanimous, that the defendants were *not* sufficiently shewn to have *usurped* upon the crown this franchise, of holding or even claiming to hold a fair or market.

RULE DISCHARGED.

On the next day (*viz.* Wednesday 27th November) Mr. Justice *Wilmot* mentioned his note of the case of *Rex v. Owen*, P. 13 G. 2. B. R. and repeated it—Mr. *Wilbraham* moved, &c.† and said there was no toll, nor weights or measures; and therefore it was no legal market. *Per Cur.* No market is *claimed by* any particular persons. If it be attended with inconvenience to private persons who have markets near adjoining it, they may bring their *action*.

And I find this further addition at the bottom of my note “However, at the prosecutor’s instance, the rule was “enlarged.” I have made a quere “*why*.” *I suppose it came on again because my brother *Aston’s* note of it is of a future term.

Mr. Justice *ASTON*—My note is of H. 14 G. 2. (which he repeated.) I took the opinion of the court, the second time it came on again; but not the first time, † when my brother *Wilmot* took his note.

Mr. Justice *WILMOT*—I have another case: which was in Tr. † 11 G. 2. B. R. *Rex v. Cann*. The chief justice being absent—The Judges *Page*, *Probyn*, and *Chapple* refused to grant the information in the nature of a *quo warranto*; because it was a *private* matter, where the party might have a *remedy by action*, if he was prejudiced.

I have also a long note of *Rex v. Sir Thomas Reynell*; § where the court held “that if *Sir Thomas* had claimed “an exclusive ferry, it *had been* the proper subject of an “information in the nature of a *quo warranto*.”

1741. I find I have subjoined to the end of my own note, the following words:—“So that it was agreed that an information would lie for setting up an exclusive ferry across a navigable river; provided the charge was sufficiently made out.”

In P. 6 G. 1. B. R. *Rex v. Nicholson et al.*—Trustees for enlarging the port of *Whitehaven*; an information in the nature of a *quo warranto* was granted; because it was a matter of a *public* nature.

Lord *MANSFIELD*—You see, these cases support our determination of yesterday: and they also support the *general* ground upon which the motion was founded.

1765.

REX
v.
MANSDEN,
et al.’

† V. ante,
p. 1820. et
supra.

[1822]

• The rule ;
was enlarged
that Ld. Ch. J.
Lee might
look into the
affidavits.

† No opinion
was given, in
P. 13 G. 2.

‡ It was in
Trin. 1737.

10 and 11 G. 2.

(Saturday,
25th June,

for holding a
court leet in

the manor of

Olveston in

Gloucester-

shire.

§ So have I. It

was on Mon-

day, 25th Jan.

the following

settling up an

1823

Michaelmas Term, 6 Geo. 3.

1765.

REX

v.

MARSDEN

et al.'

Mr. Justice WILMOT—They are strong, I own: but that is a matter of future consideration, if any future application shall be made.

Lord MANSFIELD recommended (in such case, of any future application,) a search in the Crown-office; whether there are many instances of informations in the nature of a *quo warranto* filed by the clerk of the crown, in corporation causes, before 9 Ann.

N. B. The first point stands quite free from bias from any opinion one way or the other; as all the court declared themselves open to such conviction or alteration of sentiment, as might arise from precedents which may be produced in future, or from future reasoning upon the subject.

[1823]

Thurs. 28th

Nov. 1765.

Rule not to
commit waste
pending a
writ of error.

WHAROD *versus* SMART.

MR. Francis Smart having brought a writ of error in parliament, upon an ejectment on the demise of *Boughey*,—

THE COURT obliged him to enter into a rule
“ not commit *waste* or destruction during the pendency
“ of this writ of error.”

Mr. Smart did not oppose it: and accordingly, he entered into the rule; and also *justified* (to 400L.)

The End of Michaelmas Term 1765. 6 G. 3.

HILARY TERM,

1824-1825

6 GEO. III. B. R. 1766.

REX *versus* INHABITANTS of UNDER BARROW and
BRADLEY FIELD.

Monday, 27th
Jan. 1766.

This case is already published, in the quarto-edition of my SETTLEMENT-CASES, pa. 545. No. 175, with a note upon it. An abridgment of it may be seen in the TABLE to the present volume.

WILSON *versus* MACKRETH.

Tuesday, 28th
Jan. 1766.

THIS was an action of trespass for entering the plaintiff's close called *Carr-Moss*; and digging and carrying away his turf and peat: and the general issue was joined.

Trespass vi et
armis will lie,
wherever
there is an ex-
clusive right.

It was tried at the last assizes for *Westmoreland*, before Mr. Justice *Gould*: and upon the trial it appeared in evidence—

That the plaintiff was seised in fee of a freehold tenement in the manor of *Upper Staveley*, whereof Lord *Suffolk* and Sir *James Lowther*, Bart. were lords, in which manor there is a large waste called *Staveley-Head-Fell*, upon which there are divers large mosses, out of which turves and peats are usually dug.

That the plaintiff, and all those whose estate he hath in his said tenement, hath time out of mind had and used an *exclusive right* of digging turves in a certain moss in the said waste called *Carr-Moss*, marked and bounded out from six other tracts of moss in the said waste by certain meer-stones; which tracts are and have been also used and enjoyed in the like manner as turbaries by the owners of six other tenements, whereof other persons are in the like manner seised in fee, and lying within and holding of the said manor; saving that two of the said turbaries have been sold off from two of such tenements, and used by the purchasers.

[1825]

That all these mosses lie contiguous and open to the rest of the waste; and the other tenants of the said manor, as well as the owners of the said tenements, have common of *pasture* on the said waste, and feed on these mosses, as well as on the rest of the waste.

1766.
 REX
 v.
 Inhabitants
 of UNDER
 BARROW
 and
 BRADLEY
 FIELD.

That the other tenants of the said manor also got turves on *other* mosses in the said waste, but *not* *in any of the above seven* mosses.

That the plaintiff and other owners of the seven mosses have sold the peats arising from those mosses respectively.

That the defendant dug and carried away peats in the place in question.

Whereupon a verdict was given for the plaintiff, subject to the opinion of this court upon the following question—

“Whether, upon the above state of the case, this action was maintainable.” (a)

Mr. Wallace, for the plaintiff, insisted that he was intitled to maintain an action of *trespass*.

Their objection is “that it ought to have been an action *upon the case*.”

To prove that *trespass* would lie in this case, he cited 2 Ro. Abr. 540. *Moore* 302. *Welden v. Bridgewater*, and *Bre. Trespass* 55.

Here, the plaintiff had an exclusive right, and held it separate from every other right; though charged with an incumbrance for the purpose of pasture only. The plaintiff is the owner of the soil.

Mr. Wedderburn, *contra*, for the defendant.

The plaintiff had *no right of ownership*, either in the soil, or in the profits of the soil. Therefore he can not maintain *trespass quare clausum fregit*.

[1826] This moss has been allotted to several persons, for the purposes of *turbary* only: but other tenants of the manor of Upper *Staveley* have the right of *common* upon it.

This division of this moss amongst the tenants of the seven tenements has been made for the mutual convenience of the general number of the tenants of the manor intitled to common of *turbary* for firing.

The plaintiff has *no ownership of the soil*: he has no right to dig for any thing else, *but turf only*. And if the land was drained or rendered fit for culture or pasture, he would have no right to any *improvement* of it. It is only a right of *turbary in gross*.

The cases which have been cited are not applicable. The *vesture* of the land is a right to the land itself.

Mr. Wallace was going to reply. But

(a) It did not appear that the defendant was tenant to Lord S. and Sir J. L.: if not it seems the action lay; but if he was, then *query* whether a general action of *trespass* or *case* lay. See 20 Vin. 448 (L).

Lord MANSFIELD said, there wants nothing to answer the objection, but to state the case : which I will do, for the sake of the students.

Then he stated the case, *verbatim*.

The plaintiff's right is in a several piece of ground, butted and bounded ; a separate right of property, to take the profit of the turf, and to dig it for that purpose.

The plaintiff has this right *exclusively* of all others. and the defendant has disturbed him in it. Therefore trespass lies; though he has not the absolute right to the soil. (b)

Mr. Justice WILMOT—If this was only a right of common of turbary, trespass *quare clausum fregit* would not lie.

But this is an *exclusive* right to dig turf.

It appears from 1 *Inst. c. 1.** under the word “ *land*,” * V. Co. Litt. that it is not necessary he should have the *whole property* p. 4 ab. of the land.

This must be taken to be a grant from the lord of the soil. He stands in the place of the lord of the manor.

The property of the turf is in the plaintiff. No [1827] other person could maintain this action. Therefore he may.

There is a difference between *exclusive* rights, and right of *common*. In the former case, the grantee may *take away* thorns cut: but the commoner can not. *Yelp. 187, 188. Dewlas or Douglas v. Kendall. Cro. Jac. 256. S. C.*

These mosses are *severed*, and six of them enjoyed by other people; therefore decisively a *separate* right. And therefore the plaintiff may support this action of trespass.

Mr. Justice YATES said it was a clear case: for wherever there is an *exclusive* right, trespass lies. And this is clearly an *exclusive* right.

I do not see that this right differs from a right to a sole and separate pasture, for a *time*: and in that case, during *that time*, trespass lies.

Mr. Justice ASTON was of the same opinion. [14 Vin. 84, And he mentioned the case of *Hoc v. Taylor*, in *Moore 85, 292, 293.* 355. where the second error assigned was “ that trespass “ did not lie *quare clausum fregit*; because the soil was “ not granted.” But all the court held “ that it *did* lie;” although they granted, that the soil did not pass: for, he

(b) *Qu.* whether it will lie against the owner of the soil? Vide 2 *R. Abr.* 550, or 20 *Vin.* 448, L. 4.

1766.

REX

V.

Inhabitants
OF UNDER
BARROW
and
BRADLEY
FIELD.

1766. who has *herbagium, pastura, &c.* shall have trespass *vi et armis.*

Per Cur. unanimously,
Let the *postea* be delivered to the PLAINTIFF.

Wednes. 29th
Jan. 1768.

Number of
electors
may be war-
ranted by
a bye-law.

[See 2 Durn.
459.

7 Durn. 286.

6 Durn. 733.

3 Bosan. 60.

4 Burr. 2304,
2521.]

REX *versus* SPENCER, COMMON COUNCIL-MAN OF
MAIDSTONE.

SIR Fletcher Norton, Mr. Serjeant Leigh, Mr. Burrell, Mr. Ashhurst, and Mr. Dunning, on behalf of the defendant, on *Saturday* last (the 26th of *January*) shewed cause against arresting the judgment for the defendant, and entering judgment for the king against the defendant. A rule to that purport had been made on *Monday* the 11th of *November* 1765, on the motion of Mr. Cox; who objected to the validity of the bye-law under which the defendant justified his election into the office. He urged, that it was a bad bye-law, as it restrains and narrows the number of electors without any authority from the charter, and even contrary to it; and without the consent of the electors, takes away their rights; and is vague, indefinite, and uncertain; and that such a restriction of the number of electors can not be allowed in the case of a common council-man's election, whatever might be the case of the election of the principal officer.

Sir Fletcher, having first objected to the rule as *drawn up*, proceeded to the merits; and urged, that the prosecutor ought regularly and properly to have demurred to the defendant's plea: but as he had elected to plead to issue, he was now bound by the verdict, and could not have recourse to a motion in arrest of judgment.

It was an information in the nature of a *quo warranto* for usurping the office of a common council-man of *Maidstone*.

The defendant justified under a BYE-LAW dated 18 *August* 1764, and made by the mayor, jurats and common council, by virtue of letters patent of 21 G. 2. It recites the power given by the charter "for the mayor, jurats "and *commonally* to elect common council-men;" and recites "that the *commonalty* were *very numerous*, and "the admission of them to vote at the election of com-
mon council-men had been found by experience to be
"attended with many inconveniences, and had from time
"to time occasioned divers riots and disorders and
"great popular confusions, and very much disturbed
"and broken in upon the peace, good order and govern-
"ment of the said town and parish;" and further re-
cites "that such inconveniences would be likely to be
"remedied, if the right of electing of the common coun-
"cil were to be *confined* to the mayor, jurats and com-
"mon council, and *such of the common freemen*, as had

[1828]

" *executed parochial offices* in and for the said town and parish in manuer therein after mentioned : " and then (for preventing of the like inconveniences for the future, and for the avoiding of popular confusion and disorder in the election of common council-men,) it ordains " that upon every or any *future* election of a common council-man or common council-men of the said town and parish, the mayor, jurats *and common council* for the time being, of the said town and parish, and such " of the *common freemen* for the time being, who should " reside in, *and should respectively* have gone through and " served for the space of *one whole year* RESPECTIVELY " the SEVERAL *offices* of CHURCHWARDEN AND OVERSEER OF THE POOR, RESPECTIVELY, *for the said town and parish*, or the major part of such mayor, jurats, common council-men and common freemen QUALIFIED AS AFORESAID, should meet and assemble themselves together in the court-hall of the said town and parish ; and being then and there so met and assembled together, the said mayor, jurats, *common council* and common freemen of the said town and parish QUALIFIED AS AFORESAID, or the major part of them " so met and assembled together should, *by themselves*, ~~to~~ " WITHOUT the PRESENCE or CONCURRENCE of ANY of the COMMONALTY of the said town and parish, *elect and choose* one or more of the principal inhabitants of the said town and parish to be a common council-man or common council-men of the said town and parish."

1766.

REX
V.

SPENCER.

[1829]

Note—The CHARTER directs the nomination and election of common council-men to be *by* the mayor, jurats *and* COMMONALTY, and their successors, or the majority of them, out of the principal inhabitants of the said town and parish.

Note also—The new letters patent of incorporation bear date 17th June, 21 G. 2, and incorporate them by the name of " mayor, jurats and commonalty ; " to consist of a mayor, 13 jurats (including the mayor,) and 40 common council-men : and power is granted to the mayor, jurats and common council to make bye-laws.

To this bye-law pleaded by the defendant, the prosecutor replied : 1st. That the common council were not duly assembled ; 2dly. That they had no power to make such a bye-law : and issue was joined thereupon. Both these issues were found for the *defendant*.

Sir *Fletcher* insisted, on his behalf, that the prosecutor could have no more than a rule to shew cause " why

1766.

REX

v.

SPENCER.

"this judgment should not be *arrested*:" whereas the present rule is drawn up not *only* to shew cause "why the judgment should not be arrested;" but *also*, why judgment should not be ENTERED "FOR the KING AGAINST *the defendant*."

He then answered their objections to the bye-law:—premissing, 1st. That corporations have incident power to make bye-laws. 2dly. That that power is lodged in the body at large: unless placed expressly elsewhere, 3dly. Wherever the crown gives it expressly elsewhere, the power will reside where the crown has vested it. 4thly. Wherever the power is lodged, it is equally strong; it is the legislative power of the corporation, and binds all their members. 5thly. A bye-law may, to prevent confusion, restrain popular elections: it may restrain the number of *electors*.

[1830]

The defendant's counsel then repeated the prosecutor's objections, and answered them.

1st. It is objected, that this is a bad bye-law, because it is not warranted by the charter; which only extends to cases where penalties are annexed; and that the penalties must be inflicted by the *whole* body.

Answer—But the power of *making* bye-laws is one thing: the power of *annexing penalties* is another. And here the bye-law is a good one, though it should have *no* penalty annexed to it. It is, "to restrain the number of electors to *SUCH of the commonalty as have EXECUTED the office of CHURCHWARDEN and OVERSEER*."

Besides, the words do not require such a construction as they put upon them: for the same persons are *intended* to be the makers of the bye-law, and the annexers of the penalty.

However, the true answer is "that the bye-law does *not* require a penalty: the members are *amovable*, if they *disobey* it."

2dly. It is objected that the bye-law is *contradictory* to the charter, which requires the election to be by the body at large: so that it is repugnant to the charter both in letter and spirit.

Answer—The bye-law is not contradictory to the charter: for it continues the election in the *same* set of persons, though the *number* of them is restrained. It is restrained to *such of the commonalty as have served parish-offices*: it has only *narrowed their number*; not taken it from their body. It remains *virtually and substantially* in the same parts of the corporate body.

3dly. This objection was split: and it was said, that the number of electors ought not to be narrowed as to the

election of a *common council-man*; however it might have been, if it had been the *head-officer*.

Answer—But the reverse of this objection is the truth. So that the reasoning holds *inverted*. (V. 4 *Inst.* 48, 49, 4 *Rep.* 77. b. 78. a.)

4th Objection. That the bye-law takes away the power of the commonalty, *without the consent* of the commonalty: and the Case of Corporations in 4 *Co.* 78. and 3 *Bulstr.* 71. the case of the Corporation of *Colchester* is urged in support of this objection.

Answer—But wherever the power of making bye-laws is lodged, *those persons* have the full power of making them: and the consent of the rest is included.* Which is an answer to the *Colchester* case in 3 *Bulstr.* 71. and the Case of Corporations in 4 *Co.* does not affect this case. For there *no bye-law* appeared: the judges were *forced to presume* one.

However, it still rests virtually in the body of the commonalty, though restrained as to the particular persons.

They further observed, upon the Case of Corporations “that as a bye-law was there presumed; and no particular clause in the charter appeared to *give* a power of making bye-laws: it must be presumed to have been made by their *incidental* power, and consequently to have been made by the *whole* body.” They also observed, that the body at large having themselves chosen the common council, the body at large might be said to have *actually* and *personally* consented to what these their representatives had enacted into bye-laws.

5th Objection. That the bye-law is vague, indefinite, and uncertain.

Answer—*Id certum est, quod certum reddi potest*. And here it must appear, at the time of election, *who are* those substantial electors, who have served public offices; they are sufficiently described and defined.

They therefore prayed that the rule might be discharged, and the judgment stand.

Mr. *Morton*, Mr. *Cox*, and Mr. *Wallace*, *contra, pro rege*.

They admitted Sir *Fletcher Norton*'s two first positions; but denied the third, together with its consequences: and they insisted,

That the valuable franchise of a vote given to an individual can not be taken away without the *consent* of such individual.

That the power of making bye-laws is to be taken *strictly*: and therefore this power to make bye-laws shall *not be extended* further than what appears to be the manifest intention of the charter.

1766.

REX

V.

SPENCER.

[1831]

* V. Jenkins's
Centuries,
p. 273. Case
93.

1766.

REX

V.

SPENCER.

And that this bye-law does not only restrain, but *totally varies* the mode of election established by a charter not yet 20 years old.

The charter resites the mischiefs and grievances arising from disputes about elections; and was obtained upon the representation of the commonalty. It directs, specifies, and settles a *certain* and *indubitable* method of election, that the town may enjoy peace and quiet. Then it directs and specifies the *particular rights*, and the persons who shall have such rights; and *prescribes the mode of election*: and the mode of election is directed and prescribed, *subsequently* to the clause which gives the power of making bye-laws; and it describes what species of bye-laws they are to be. Surely, this is a *negative* upon a bye-law afterwards made to the contrary of it.

The charter only intended to give the select body a power to make bye-laws for correcting offenders, for regulating trade, and matters of the like kind: in short, such bye-laws as might be enforced by penalties; *not* such as would *take away the rights of election*.

And they can make no bye-laws *but* such as are *within* the power given them by the charter. So was the opinion of the lord chancellor, in the case of *Child v. Hudson's Bay Company*, 2 *Peere Williams* 209.

The charter now under consideration expressly gives the right of election to the COMMONALTY. But this bye-law totally alters, overturns and changes the nature of the election: it takes it quite away *from* the commonalty, and places it in a *few house-keepers*, who have served certain parish-offices.

They said, they would not contend for any distinction between the election of *principal* officers of corporations, and *subordinate* ones: (which distinction might perhaps be argued for, from the Case of Corporations in 4 *Co.*)

But, certainly, an integral part of the corporation can not be struck off: nor can the makers of a bye-law take the power of election from those to whom the charter has given it, and place it in themselves. Whereas here the makers of this bye-law have, in a great measure, placed the election in themselves. For, as the charter contains a clause of *ne intromittas* as to the county justices, the *borough-justices* have the power of appointing overseers: and three of these reduced electors are borough-justices by their office.

[1833]

The power of voting (a very valuable franchise) *can not be taken away* without the *consent* of the voters.

The king himself can not take it away, when he has once given it. A man once possessed of a franchise can not lose it *without his own consent*. 4 *Co.* 77. le Case de Corporations. *Bulstr.* 71. the case of the corporation of

Colchester. Comberb. 316. *Rex v. Larwood*, and 1 Salk. 190.
Buller v. Palmer.

1766.

REX
 V.

SPENCER.

THIS bye-law totally changes the nature of the election: it reduces it from 800 voters to ten. It varies and alters the qualifications of the electors: it does not only restrain their number.

This kind of restriction is what this court will never allow. It is narrowed, restrained and limited to those very few who have served the offices of churchwardens and overseers. There is a vast difference between 800 commonalty, and a few parish-officers: some of which are to be appointed by the parson of the parish, and others by the corporation-justices.

Besides, many persons *fine* for these offices, and do not actually serve them: others are privileged by their professions; others are exempted by *Tyburn tickets*. Shall these persons lose their rights of voting? This bye-law flies in the face of the charter, and contradicts the king's intention: and it would not even answer the end it professes, of avoiding popular confusion and disorder.

Upon this first argument,

Lord MANSFIELD said, he saw reasons to doubt of the bye-law; and desired to consider of it.

It is now settled,* that the number of the electors may be restrained by a bye-law: but a bye-law can not strike off an integral part of them; neither can it narrow the number of the persons out of whom the election is to be made."

* It was settled, not only in the case of *Rex v. Phillips* mayor of Carmarthen, hereafter

See Bae
 ab fih
 By Laws

mentioned,) but also in a later case of *Lee v. Wallis et al.* 27th January, 1756. in this court. "That a bye-law may narrow the number of the electors, but not of the eligible." [See 4 Bur. 2519.]

The charter gives the right of election to the commonalty. But the bye-law restrains it to a few of them: and those few, under a particular description, namely, such as have been churchwardens and overseers. The corporation-justices appoint overseers: and several persons may be exempted or excused from serving that office at all. These persons would be totally excluded from ever voting. So that some votes would be preserved, of persons nominated by the mayor and jurats, and others could never vote at all. It deserves consideration, "whether this is a reasonable restriction:" though this select body have a power given them by the charter to make bye-laws.

[1834]

Mr. Justice WILMOT inclined to think the bye-law unreasonable.

He thought, the court ought to take care that the per-

1766.

REX

V.

SPENCER.

sons impowered to make bye-laws, exerted their power in a reasonable manner.

They ought not to take the power of election from others, and place it in themselves. Here, the jurats, &c. being corporation justices, have the appointment of overseers. Consequently, this bye-law puts it into their power to say *who* shall be the electors. And, as some of the overseers are to be named by the parson, it so far puts the election into the power of the parson: or, at least, it may put it into the power of other persons, not corporators, who may have the right of choosing churchwardens.

As to the objection of the want of the *consent* of the commonalty to the bye-law—He thought them as much included in and bound by a bye-law made by the select body to whom the charter gives the power of making bye-laws, as if they had actually given their own consent.

Mr. Justice YATES, and Mr. Justice ASTON thought it bad. A bye-law may narrow the number of *electors*; not altering the constituent parts. But here they have gone out of the charter, and *imposed qualifications not mentioned in it*, nor at all *connected* with the corporation.

[4 Burr. 2541.]

The commonalty are, by the charter, an integral part of the constitution. And this bye-law admits those of them to have a vote, who *have served these offices*; and *excludes* those of them who *have not*; though some of them may be incapable or not obliged to serve them, and though this qualification has *no connexion* at all with the corporation. And the corporation-justices have the

[1835]

It was P.

14 G. 2. B.R.

and in Dom.

Proc. 1742-3,

when the

lords affirmed

the judgment

of this court.

The charter

directed the

election to

be made out

of four persons

to be nominated

out of the

burgesses or

inhabitants

at large. The

bye-law directed

it to be made

out of four

persons to be

named out of

the aldermen,

or at least one

of whom should

be an alderman.

appointment of overseers, in their own hands. In the case of *Rex v. Tucker, Mayor of Weymouth*—A bye-law by the mayor and aldermen, “that the mayor

“should be chosen out of the aldermen,” was held bad.”

So here, they have restrained the electors, *not generally*, but with such a distinction as in effect places the election *in themselves*.

LORD MANSFIELD said, these observations struck him very strong.

The bye-law *introduces a new description* not mentioned in the charter, not at all *connected* with their corporate character, as a qualification to enable them to elect; and *excludes* such of them from the right of electing, as *have not this qualification*.

Sir *Fletcher Norton* observed that this was *new matter*, as to which he had never been heard.

Lord MANSFIELD—You ought to be heard to it.

Let it stand over till *Wednesday*.

ADJOURNED till *Wednesday* the 29th.

On which *Wednesday*, the 29th, the counsel for the defendant, Sir *Fletcher Norton*, Mr. Serjeant *Leigh*, Mr. *Burrell*, Mr. *Ashhurst*, and Mr. *Dunning*, endeavoured to answer the objections.

It has been objected, 1st. That an *integral* part of the corporation cannot be struck off; 2dly. That the bye-law places the power in *themselves*; 3dly. That it *imposes a qualification* not at all *connected* with the corporation.

First. The Case of Corporations in 4 Co. 77. b. 78. a. is an authority for us, standing unimpeached: it was there resolved, “that where the charter gives the election to the commonalty, an election by a certain selected number of the principal of them, commonly called the common council, and not in general by all the commonalty, may be good.” The point “about an integral part of the electors being excluded,” was not determined in the case of *Rex v. Phillipps, in Carmarthen, Trin. 1749, 22, 23 G. 2. B. R.* That determination was, “that a bye-law may restrain the number of the electors, but not the number of the objects of election.” [1836]

Here the common council are *not* a distinct integral part of the corporation; for they *remain part of the commonalty*: whereas in *Carmarthen*, the common council were chosen *out of the burgesses*, and *not* out of the commonalty; and they had *never been* part of the commonalty. But this corporation of *Maidstone* consists only of a mayor, jurats, and commonalty. Therefore the commonalty are *not* here *excluded*: it is only a *reduction* of 800 to a smaller number of the *same* persons; which is allowable.

Secondly.—This bye-law does *not* put the corporation into the power of the mayor and jurats, as is objected. For whatever may be said about the overseers, yet still the *churchwardens* may very well represent the commonalty: *they* are not chosen by the borough-justices, but appointed by quite other persons. The 43 *Eliz. c. 2.* gives [There is no such thing in 43 *Eliz. 2.*] the nomination of them to the *parish*; the justices are, in their case, *only ministerial*. The power of appointment of *overseers* is *not* in them.

In the case of *Rex v. Justices of Dorchester*—upon a *mandamus* to the justices “to sign a rate”—It was holden “that their signing a rate was a matter of form only:” they are *obliged* to sign it.

If this bye-law had in fact tended to place the election in *themselves*, it would not have made it a bad one: for

1766. the court can not get at the fact, how far the balance of
 REX influence is altered. And they will not *presume* any im-
 v. proper design or consequence: so far from presuming that
 SPENCER. they will act *wrong*, it shall be presumed that they will
 act *right*.

This bye-law being made by the persons impowered by the charter to make bye-laws, is to be considered upon the same foot as if it had been made *by the corporation at large*: and *they* have a right to restrain the number of electors to *any* number, how small soever. And the very case is put in the Case of Corporations, 4 Co. by way of illustration: it precisely supposes it. And in that case, there was a common council; which must have been by charter, or at least by prescription.

Thirdly—As to the objection “that this qualification “does not at all *relate* to their corporate capacity—”

[1837] This bye-law is only *descriptive* of *such of the commonalty*, as shall have a right to vote. It describes the *most substantial* of the commonalty, by their having gone through these public offices. And surely, the bye-law will not be the worse for *superadding* a qualification. This is *not* introducing a *new* class of men under this description: it is only a restraint of the *same* persons, and confining them to such *as* are so qualified.

[See 4 Bur.
 2208.
 4 Durn. 428.]

LORD MANSFIELD—From the cases cited or alluded to, it appears to me, that where the power of making bye-laws is by charter *given* to a *select body*, they do not represent the whole community; and therefore cannot assume to themselves what belongs to the body at large: but where the power of making bye-laws is in the *body at large*, they may *delegate* their rights to a *select body*; who become the representative of the whole community.

Now here the charter appoints the election of the mayor to be by the jurats; and of the jurats, by the mayor, jurats, and common council-men, (excluding commonalty:) and of the commonalty, by the mayor, jurats, and commonalty.

I remember, the charter was much litigated at the time of passing it. And it was matter of deliberation, “whether the power of election should be fixed in the body “*at large*, or in the *select body*.”

I understand the charter as if it had said in express words “that the *commonalty* shall vote *for themselves*, and “*not* be represented by the common council.”

It is by no means to be compared to cases where there is a common council who are supposed to have been *created by the commonalty*, and therefore have the original power of the commonalty in them.

[4 Burr. 2520.] Here the common council is *no part* of the commonalty,

but a distinct body. They are constituted *eo nomine*, as common council-men; which is an office for life.

1766.

REX
V.

This alone, would be a sufficient objection to the bye-law.

SPENCER.

But further, they have here confined the qualification to what *does not relate to or concern the corporation*; to having been churchwardens, persons appointed annually by the parson; or overseers, persons nominated by the justices.

This is an abuse of their power for the private benefit [1838] of those that have exercised it.

I am therefore clearly of opinion "that it is a null and void bye-law."

Mr. Justice WILMOT declared himself of the same opinion.

The true test of all bye-laws is the intention of the crown in granting the charter, and the apparent good of the corporation. And upon this principle stands the power of controlling by a bye-law the words of a charter, as far as relates to the distinction between narrowing the number of electors, and narrowing the number of those out of whom the election is to be made. A bye-law may restrain the number of the electors; but it cannot narrow the objects of election. The former tends to avoid popular confusion and riot: but that reason does not apply to the objects of election. This was settled in the *Carmarthen* case (*Rex v. Philips, jun. Mayor of Carmarthen, Trin. 1749, 22, [Sayer's Rep. 259.]* 23 G. 2. B. R.) and it was there holden "that a bye-law can't exclude an integral part of the electors."

I do not say, that any integral part is here struck off: [Salk. 398.] which, I think, could not be done.

But a qualification is required, which is neither mentioned in the charter nor at all connected with their corporate character. The charter says the election shall be by the mayor, jurats and commonalty. The bye-law says it shall be confined to the mayor, jurats, and common-council, and such of the commonalty as shall have served the offices of churchwarden and overseer of the poor for one whole year.

The charter having named the common council shews that they were meant to be a distinct body or class. No bye-law could have confined it to the common council alone: neither can a bye-law confine it to such of the commonalty as are under such a qualification as is here required.

The crown have added no qualification to the votes of the commonalty. The bye-law cannot superadd a qualification when the crown have not; and which has no relation to or connexion with their corporate character and capacity. It is in the teeth of the grant.

1839-1840

Hilary Term, 6 Geo. 3.

1766.

REX
V.
SPENCER.

Besides, this is, in effect, putting the power in *themselves*: for they have the nomination of *overseers*. *churchwardens* are not, indeed, appointed by themselves: but they are appointed by strangers to the corporation. The makers of the bye-law had no right to impose such qualifications.

Therefore this bye-law is *void*. It not only restrains the number of electors, but *imposes qualifications contrary to the intention of the charter*. Therefore it is not justified by the Case of Corporations in 4 Co. 77, 78.

5 Term R 736. 601 2260
Mr. Justice YATES—Corporations cannot make bye-laws *contrary to their constitution*. If they do, they act without authority. This bye-law is made by the mayor, jurats, and common council; to whom the power of making bye-laws is given by the charter.

The common council cannot be considered as the representatives of the whole body of the commonalty.—The common council mentioned in this charter, are plainly a distinct body from the commonalty.

This bye-law was not *actually* made by the whole body.

The *Carmarthen* bye-law was supposed to be a bye-law made by the *whole* body: so was the Case of Corporations in 4 Co. Whereas, here, the mayor, jurats and common council, (which common council are a distinct body from the commonalty,) make the bye-law, and place the election in the mayor, jurats and common council, together with a part of the common freemen.

This part of the bye-law I therefore hold to be unreasonable, illegal, and bad.

Then as to that part of it which imposes the qualification upon the freemen—It requires from the electors appointed by the charter, a qualification not mentioned in the charter; the having executed quite distinct offices, not at all connected with the corporation. I can not conceive that even the *whole* body could have thus *varied* an *essential* part of their constitution.

These officers (churchwardens and overseers) are alien to the corporation; and depend upon the will of others, and partly upon the nomination of some of the very makers of the bye-law.

The bye-law is, in my opinion, clearly *void*.

[1840]

Mr. Justice ASTON—The common council, though part of the corporate body, are a *distinct class* from the commonalty: they are part of the select body to whom the power of making bye-laws is given. A bye-law may narrow the number of the *same* electors: but it *can not transfer* the right of election to *different* persons.

There was no common council distinct and as a select body, either in the *Carmarthen*-case, or in the Corporation-

case in 4 Co. 77. b: Therefore they remained as part of the general body: here, they are a distinct class.

1766.

The intention of the whole charter is to be considered in the construction of it.

REX
v.

You can not change the right of the electors from one body to a different body, or *intermix* other persons with those who have a right in them.

SPENCER.

This bye-law is a manifest scheme of the makers of it, to put the power of election in themselves.

And the qualification here annexed is a suspension of their right, *till* they shall have served these offices, respectively, for a whole year: so that it is a suspension for *two* years, at the least. There is no end of qualifications of this sort.

It is a *bad* bye-law.

The bye-law being thus holden to be bad, the judgment was *ARRESTED*. And the court declared, that there ought to be *no costs* of the trial or motion, on either side.

V. post. pa. 2204. *Rex v. Cutbush*, 30th April 1768.

REX *versus* INHABITANTS OF SILCHESTER.

Saturday 1st
Feb. 1766.

This case is already in print. It is *abridged* in the TABLE.

See it at *large* in my SETTLEMENT-CASES, No. 176. Pa. 551.

FOTTEREL *versus* PHILBY.

[1841]
Monday, 3d
Feb. 1766.

MR Stowe shewed cause against the defendant's being discharged out of the custody of the marshal; a rule for that purpose having been made on Sir Fletcher Norton's motion upon the following fact, *viz.*

A committitur in execution must be entered within two terms.

A committitur in execution was entered in the marshal's book; but no committitur-piece was filed; nor was the committitur entered on RECORD within two terms.

In 2 Strange 1215, *Unwin v. Kirchoffe*—The court held "that the committitur must be actually entered * on * v. post. " record before the end of the second term."

Woodbridge
v. Forth, esq.
B. R. 11th
July 1773.
Trin. 13 G. 3.
accord.
[And see
1 East 407.
3 Bosan. 459.]

Here is no entry of the defendant's commitment on the ROLL; nor any committitur-piece filed, to authorize its being so entered on record.

Therefore Sir Fletcher prayed that the rule might be made absolute for discharging the man: and

The RULE was made ABSOLUTE, accordingly.

1842

Hilary Term, 6 Geo. 3.

1766.

Wednes. 6th

Feb. 1766.

Indictment
for selling by
false weights,
not to be
quashed upon
motion.

REX *versus* CROOKES.

THE COURT refused to *quash* UPON MOTION an indictment found at the quarter-sessions for *selling by false weights*; though Mr. *Wallace* made two objections; viz. 1st. That the charge was "that the flour-scale was the lighter;" from whence he inferred that the defendant must injure *himself*, not his *customers* who bought flour of him: 2dly. That the charge was only of selling by those false scales, *generally*, not saying *where*: so that it did not appear that the offence was committed *within the jurisdiction* of the justices.

THE COURT said they were NOT OBLIGED to *quash on motion*: and as this was an indictment for such an offence, they might *demur* to it.*

* They after-

wards refused to *quash* upon motion, an indictment for selling coals by false measure, Rex v. Osborn, Monday 28th April, 1766.

[1842]

Thursday, 6th,
Feb. 1766.

MOTION DENIED.

REGULÁ GENERALIS.

Enlarged rules
to a subse-
quent term to
be on fixed
days, and
judges to have
copies there-
of the day be-
fore the be-
ginning of
every term.

LORD MANSFIELD mentioned and declared that the court was come to a resolution—

That every rule which shall be enlarged to the next subsequent term, shall be fixed to a particular *peremptory day*, within the *first five* days of such subsequent term; namely, the first five, to be appointed for the first day; the next five, for the second day; the next five, for the third day; the next five, for the fourth; the next five, for the fifth; and then round again, in addition to each day; and shall be called by the officer, after the whole bar shall have moved.

His lordship observed that this will be a very great convenience to the gentlemen at the bar, especially those who are in great business; as they will know when to be ready and prepared, by being apprized of the exact time when the motions are to come on; and also to the attornies, who will then know with certainty, *when* to attend their motions, and not be obliged to attend from day to day at an absolute uncertainty when they may chance to be heard.

Whereupon I took the liberty to mention to the court, how very proper and convenient this regulation would be in *another* respect also, viz. in saving expence to the suitors of the court: for that the bills of costs which came before me for taxation were at present full of numerous charges for attending motions for a great many days together; upon all which days they alledged that they had actually and necessarily attended; the truth of which assertions it was almost impossible for me to judge of,

and consequently to know how many attendances it was reasonable to allow them for. 1766.

Lord MANSFIELD mentioned this to the bar, and said that in *this* respect also, it would be a great convenience to the attorneys as well as the client; for that it was not worth their while to attend here several days at an uncertainty, for the common fee allowed for an attendance; and by this regulation, the particular day will be punctually ascertained.

Master *Owen* informed his lordship (which he also mentioned to the bar) that it would be still *more* advantageous to the attorneys on the *civil* side; as he never allowed them any more than *one* attendance, be their actual attendances ever so many.

Lord MANSFIELD added a direction, "that after [1843]
" every term, there be a *list* made out, and fixed up in
" the offices, both on the crown and civil side, of the
" rules so enlarged, and the particular days when the
" respective motions are to come on: and that a copy
" of such lists be delivered to the judges respectively,
" the day before the beginning of every term."

MEMORANDUM—The next day (*Friday* the
7th of *February*) at the sitting of the
court—

Lord MANSFIELD spoke to both the clerks of the rules, and told them that instead of going on with five causes for five days, and then round again, (which would overload those five first days,) it would be better, and he accordingly directed, that the method should be as follows, *viz.* "to appoint the *first five* enlarged rules (either " on the criminal or civil side of the court, as they might " happen,) for the *first* day of the next term: the *second* " *five*, for the second day of it; the *third five*, for the " *third day*; and so on, *toties quoties*, to the 6th, 7th, " 8th, 9th, 10th and following days of such subsequent " term, WITHOUT *returning* back at all to the first " day."

N. B. An attorney now present in the court, declared publicly, upon his cause being put off till to-morrow, "that he had attended it *fourteen* days, but had not " been able to get it on;" some or other of the counsel concerned in it, being either absent or otherwise engaged.

This rule, and the appointment of particular days for special motions, have had a wonderful effect.

Formerly, no rule to shew cause came on, till it was moved by counsel: and no counsel might move oftener than once. Matters of the most consequence and greatest length were postponed. The leading counsel

1766. could keep back what they pleased. Business was thrown off to the end of the term; and so great a load upon the last day of it, that though the court sat till mid-night or later, nothing could be gone into, but was of course adjourned till the next term; and with a little management (where delay was wished,) from term to term. But *now*, though the business is greatly increased, and increases daily, the whole is gone through with ease; the counsel know what to be prepared upon; the attornies know when to attend; and every possibility of affected delay is cut off: nobody attempts it; because they know, it would be in vain.

[1844]

Saturday, 8th Feb. 1766. *HERNAMAN versus BAWDEN, et al.* Executors of FORD.

Sailors wages not recoverable if ship taken or lost before the end of the voyage. [See 15 Vin. 235. pl. 15. 4 East, 43. Ld. Raym. 739.]

THIS was an action by a sailor for wages in a voyage "to *Newfoundland*; and from thence to *Spain* or "*Portugal*, or some port in the *Mediterranean*." A verdict had been given for the defendant: and the judge (Mr. Justice *Gould*) gave the plaintiff leave to move for a new trial, without payment of costs; upon a question which arose at the trial.

The question was "whether the sailors in *such* voyages "are intitled to their wages, at *Newfoundland*, or not "till the ship's arrival at the port of delivery of the "*fish*."

The contract was "that the wages should be paid at "that port at which such wages were *usually due*."

The fact was "that this ship was taken, *after* its "arrival at *Placentia* in *Newfoundland*; and upon its "voyage from *Newfoundland* to its port of delivery of the "*fish*."

It was insisted on the part of the defendant, that in the course and nature of *this particular trade* to *Newfoundland* for *fish*, the whole is considered as one *entire* voyage; and is not understood to be *finished*, till the ship's arrival at the *port of delivery* of the fish: though they admitted that the *general* rule in *other* voyages, was, "that "the wages are due upon the ship's arriving at its *first* "port of destination or delivery."

Contra—for the plaintiff, it was *denied* that this is the course or custom in those *Newfoundland* voyages; *unless* it be *particularly specified* in the contract: which, the plaintiff's counsel said, was *usually done*, when this was *intended* by the parties.

They argued, that *freight* is the mother of wages: and that the *quantum* of the freight is quite immaterial.

Here, no such custom, as is alledged, has been *proved*.

Indeed, a special contract *may* control a general law: but *this* contract *does not* do so. Nor can the *OPINION* of

two or three witnesses, or even of the jury, establish it as a custom.

And its being *usually inserted* in the contract, proves "that there is no such general custom."

Lord MANSFIELD—It depends upon a matter of fact, whether this case is within the general rule of law: which matter of fact is "WHERE the first place or port of DELIVERY, upon this voyage or contract, is."

It is a voyage from *Barnstaple to Portugal or Spain, or other port in the Mediterranean*, taking in a cargo of fish at *Newfoundland*. And so is the very contract itself: which describes it as *one single voyage*: which is to *end* either in *Spain or Portugal* or some port in the Mediterranean, at the election of the freighter.

And the ship was lost before it arrived at its port of delivery.

Therefore the verdict is right.

Mr. Justice WILMOT concurred. *Newfoundland* is not the *delivering* port; but the *loading* port: there the *cargo* is to be put on board; which cargo is to produce the *profit* of the voyage.

This is a contract for a voyage from *Barnstaple* to some port in *Spain or Portugal*, or some port in the *Mediterranean, going round by Newfoundland*.

Mr. Justice YATES concurred. It is all *one entire voyage*. The *fish* is the *only lading* of the ship: no matter where taken in. And the ship was lost before its arrival at the port of delivery. As the freighter lost his cargo, the mariner ought to lose his wages. The verdict is right.

Mr. Justice ASTON declared himself to be of the same opinion.

The *postea* was ordered to be delivered to the DEFENDANT.

BENSON *versus* SIR THOMAS FREDERICK, Bart.

LORD MANSFIELD reported the evidence given upon a writ of inquiry which had been executed before him; and upon which, 150*l.* damages had been given. Excessive damages alone on a writ of inquiry not a cause for quashing the same.

It was an action brought against the defendant, who was colonel of the *Middlesex* militia, for ordering the plaintiff, who was a common man therein, and had a furlough from the major, to be stripped, and to receive 20 lashes from two drummers. [1846]

Mr. Morton had moved to set aside this verdict, for EXCESSIVENESS of damages; and had obtained a rule to shew cause.

1766.

HERN-
MAN
V.

BAWDEN,
et al.'

1766.
BENSON
V.
FREDERICK.
[See 4 Durn.
659.]

The counsel on both sides left it upon his lordship's report.

Lord MANSFELD said, he had no doubt but that it might be right to give an opportunity of reconsidering verdicts where excessive damages had been given.

But in the present case, he was not dissatisfied with the verdict: for Sir *Thomas* had manifestly acted arbitrarily, unjustifiably and unreasonably. He had ordered this innocent man to be flogged (though unjustly and improperly,) merely out of spite to his major; because the major (*Spinnage*) who gave the man the furlough, had offended him: in which, he acted *malo animo*, and out of mere spite and revenge. And the man, though not much hurt indeed, was scandalized and disgraced by such a punishment. The defendant is a man of such substance as to be very able and sufficient to pay this sum; and could only save a *part* of it by having a new writ of inquiry, if we were to direct one. His lordship acknowledged that he thought the damages were very great, and beyond the proportion of what the man had suffered: and yet, under the whole circumstances of the case, he was not for granting a new trial.

Mr. Justice WILMOT concurred; and observed, that it was rather owing to the lenity of the drummers than of the colonel, that the man did not suffer *more*. Therefore, though he had no doubt but that the court might look upon these damages to be too high, in a common and ordinary case, and had power to set aside the verdict and award a new writ of inquiry; yet, as in *this* case, the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the court were obliged to set aside the verdict that the jury had found.

Mr. Justice ASTON concurred. He was very full in vindicating the discretion of the court, to grant new trials, even when the damages were ideal: and cited the case of * *Wood v. Gunston*. But as, in the present case, the defendant had acted very arbitrarily and unjustifiably, and under the circumstances that appeared upon the report, he did not think *this* to be a proper occasion for the court to set the verdict aside.

Per Cur. unanimously,

RULE DISCHARGED.

Tuesday, 11th
Feb. 1766.

Bye-law in
restraint of
trade bad.

HESKETH *versus* BRADDOCK.

THIS was a writ of error from the great sessions for the county of *Chester*; who had reversed the judgment of the *Portmote* court of the city of *Chester*, in an action of debt brought there for recovering a penalty of

five pounds, upon a bye-law made by the corporation of the city of *Chester*. The breach of the bye-law was assigned in the defendant's keeping an open shop, and exercising the trade of a grocer within the said city; though he was not a freeman of the city.

1766.

HESKETH
V.
BRADDOCK.

The original action was brought by *Peter Ellames* and *Henry Hesketh* the treasurers of *Chester*, in the said court holden before the mayor called the *Portmote* court; and judgment was there given for the plaintiffs: after which judgment, *Peter Ellames* died.

The declaration states an ancient custom, "that no person whatsoever, not being free of the said city, might or ought to sell or put to sale any wares or merchandizes within the city or the liberties thereof by retail: or keep any open or inner, or other place or room for shew, sale, or putting to sale of any wares or merchandizes by retail; or to use or exercise any art, occupation, mystery or handicraft within the same city: the time of the fairs excepted." Then it states a custom "that the mayor, aldermen and common council might ordain fit remedy for any customs that might seem difficult or defective; or if any things newly arising, where remedy before was not ordained, should need amendment."

Then the declaration states, that at a common council holden on 26th September; 9 G. 2. before the mayor, &c. duly assembled according to the aforesaid custom, &c. a bye-law was made, "that no person whatsoever, not being free of the said city, should, at any time after the feast of *St. Michael the Archangel* then next ensuing, by any way, colour or means whatsoever, either directly or indirectly, by himself or any other, shew, sell or put to sale any wares or merchandizes whatsoever, by retail; or keep any shop or other place whatsoever inward or outward, for shew, sale or putting to sale any wares or merchandizes whatsoever, by way of retail; or use any art, trade, occupation, mystery or handicraft whatsoever, within the said city or the liberties or suburbs of the same, (the time of fairs in the said city excepted;) upon pain to forfeit the sum of five pounds, &c. to be recovered by action of debt, bill or plaint, to be prosecuted in the name of the treasurers of the said city, in the abovementioned court of *Portmote*, to be held before the mayor, &c. &c. with costs of suit; and that (after the costs of suit had been deducted,) one-third part of such forfeiture should be distributed among the prisoners in *Northgate* gaol of the said city; and another third part should be paid to him or them who should first give information of such offence."

[1848]

1766. Then the declaration assigns the breach, as is above-
 HESKETH mentioned.
 v. The defendant pleaded "*nil debet*:" and issue was
 BRADDOCK. joined thereon; and a *venire* awarded to the SHERIFFS
 of the city of Chester.

The defendant, on the return day of the *venire*, *challenged the array of the pannel*, because it was arrayed and made by the SHERIFFS who were *citizens and freemen* of the said city. Wherefore he prayed "that the said pannel" might be quashed."

To this challenge of the array of the pannel, the plaintiffs demurred. And the defendant joined in demurrer. After which joinder in demurrer, the record immediately proceeds thus—"And hereupon it is judicially taken notice of, by the said court here (the *Portmote* court) and is known to the same court, that by the custom and constitution thereof and of the city aforesaid, no person or persons can or ought to array the pannel of any jury within the jurisdiction of the said court or in any civil suit within the said city, other than the *sheriffs* of the city for the time being, or one of them, or by reason of any default in the said sheriffs, the *coroners* of the said city for the time being, or one of them; and that by the custom of the said city from time immemorial, no person or persons can or ought to be sheriffs or coroners of or within the said city, but citizens and freemen of the same city."

The record then states the judgment of the *Portmote* court, "that the said *challenge* of the defendant to the said array of the said pannel be *disallowed*; and that the said *pannel* of the aforesaid jury so arrayed as aforesaid, be *allowed and taken*."

[1849] Then the record goes on and states that the defendant, *ore tenus*, in open court challenged the *POLLS*; because the *jurors* and each of them were *citizens and freemen*.

This challenge was also disallowed by the *Portmote*-court: and thereupon the issue was tried; and a verdict found for the plaintiff; and judgment accordingly.

A writ of error was then brought in the court of great sessions: and the judgment of the *Portmote*-court was reversed there. Upon which judgment of reversal, the present writ of error was brought here.

On *Tuesday*, the 28th of *January* last, this case was argued by Mr. *Davenport* for the plaintiff in error, (who was also the original plaintiff below;) and Mr. *Ashhurst*, for the defendant, (who was the original defendant below.)

Mr. *Ashhurst* declaring that he did *not* mean to dispute

the custom, nor the * *bye-law*, nor the *form* of the declaration; but chiefly objected to the INTEREST of the *sheriffs* and *jurors*;

1766.

HESKETH
v.

BRADDOCK

* It had been objected below "that the bye-law was a bad one; and that even the custom itself, upon which it was founded, was a bad custom; in as much as appeared thereby, that none could array the panel, but persons who were themselves freemen."

Mr. *Davenport* applied himself to answer that objection.

It was in the *Portmote*-court objected, on the part of the defendant, "that the sheriffs and jurors were *citizens* and *freemen* of the city of *Chester*."

He first cited *Co. Litt.* 156, 157. And then endeavoured to shew that the sheriffs were either not interested at all; or if at all, at least in so small and trifling a degree, that it could be no objection to their returning the *venire*: and that the interest of the jurors was likewise either none at all, or not sufficient to ground the least suspicion of bias upon. Indeed, the objection does not lie at all against such of the freemen as are not traders.

One third part of this penalty is to be given to the prisoners; one third to the informer; and one third is unappropriated: the freemen have no benefit in it, *as such*. If they had, it would not be a sufficient objection: as appears by 2 *Lev.* 231. *Rex v. Mayor, Citizens, &c. of London*.

Admitting "that there may be a *small remote* interest," [1850] the case of *Ball and Bostock* in 1 *Strange* 575, shews that a person, though in some degree interested, may yet be a witness.

In the course of his argument, he endeavoured to shew that the bye-law was a good one; and cited *Carthew* 480. *The City of London v. Vanacker*. 1 *Ld. Raym.* 496. S. C. (with respect to the city of *London* fining those who are elected and refuse to serve the office of sheriff.) 1 *Lev.* 14. *Mayor and Commonalty of London v. Bernardiston*, 2 *Keble* 295. *Mayor and Commonalty of London v. Gould*. 12 *Mod.* 669. *The City of London v. Wood*. 1 *Salk.* 397. S. C. 8 *Rep.* 121. *Waganor's case*. 2 *Brownl.* 289. S. C. *Waggoner v. Fish*. *Wakeman v. Harris*, B. R. *Trin.* 1753. 26, 27 *Geo.* 2. in *Worcester*. *Bodwick v. Fennell*, M. 1748. 22 *G.* 2. B. R. on a like bye-law as the present; at the *Devizes*. *Errington v. Geekie*, *Pasch.* 9 *G.* 2. B. R. there cited.

The same objection must lie against a judge, as against a jury: because one is to judge of the law; the other of a fact.

Here, the mayor, sheriffs, coroners, and jury were all of them citizens and freemen,

1766. No part of the *penalty* appears, upon the face of the record, to belong to the *city*; nor is it necessary that every freeman should be considered as interested.

HESKETH v. BRADDOCK. He therefore prayed that the judgment of the great sessions of *Chester* should be reversed.

Mr. *Ashhurst*, *contra*, for the defendant.

The *sheriff*, at the time of arraying the pannel, was a citizen of *Chester*; and appears upon the face of the record to be so: and this is a good cause of challenge. *Co. Litt.* 157. 12 *Mod.* 687.

The interest of the *sheriff* is either *direct*, or at least so *consequential* as to affect him.

The *penalty* is divided one third to the prisoners, one third to the informer; and one third remains undisposed of, and therefore belongs to the plaintiff (the treasurer) for the *benefit* of the *corporation*. (For which, he cited a case in *H. 3 G. 1. B. R. Hollings v. Hungerford*.) And the *sheriff* is *confessed*, by the demurrer to the challenge, to be a citizen; and, *as such*, to be intitled to a part of it.

He cited the case of *Anstey v. Dowsing*, 2 *Str.* 1253. in answer to the *minuteness* of the interest not making any difference. Any degree of interest is an objection. So it is to witnesses with regard to the *repair of county-bridges*. So it is to corporators: 1 *Vern.* 254. *Corporation of Sutton Coldfield v. Wilson*. So it is to parishioners: 2 *Vern.* 317. *Dodswell v. Nott*;—Where the suit related to the loss of money given for the benefit of the parishioners; and the question was “whether any inhabitant of the “parish ought to be admitted as a witness;” and it was insisted “that the interest was so minute and inconsiderable, that it could not be presumed to influence or “bias the witness in his evidence.” But the court, in that case, said “the cases, where the party was concerned “in interest, though never so small, have always prevailed: and it was so resolved, upon great debate, in “the case of the city of *London* concerning the water-bailiff.”

Therefore the *minuteness* of the interest is out of the case.

But if the *sheriff's* interest is not direct, it is at least *consequential*, and a principal cause of challenge.

The case of *witnesses* is applicable to the present question. They are not admissible, if interested; as, for instance,

A *commoner*—to a right of common;

A *parishioner*—to a *modus*;

A pilot—about steering a ship, 1 *Salk.* 287. *Martyn v. Kendrickson*—In which last case, *Holt*, Ch. J. would not

suffer the pilot to be a witness; because he was answerable, if faulty in steering, to the master. Indeed, the objection lies stronger to a jury-man than it does to a witness---there is a check on the one: none on the other.

1766.
HESKETH
V.
BRADDOCK.

This being a plea of *nil debet*, it was necessary to *prove* the *whole* declaration; and, consequently, to *prove the custom*, and also the *bye-law*: and therefore the jury ought not to have been returned by *citizens and freemen*, who must have a bias in its favour.

As to the reason given in the record, why the court [1852] below *did not allow* the challenge---It is an arbitrary reason: it should have come by way of *counterplea*.

Besides, such a *custom* as is *ante* 1848. alledged, "that *none but sheriffs and coroners can array the pannel*," is a *bad custom*.

This bye-law does not nor could exclude *this* court from trying this cause: nor could hinder it from being tried elsewhere than in the *Portmote*-court. Therefore if the sheriffs and coroners could not return a jury, the plaintiffs *MIGHT have tried the cause ELSEWHERE*.

He then answered the cases cited on the other side.

The cases in 1 *Ld. Raym.* 496, *Carthew* 480, and 1 *Lev.* 14. were upon returns to writs of *habeas corpus*: *this* is by way of *challenge*. 2 *Keb.* 295. is as much for *me*, as for *Mr. Davenport*. 2 *Lev.* 231. does not hold so *strong*, as in the case of a sheriff.

In the case of *Bodwick v. Fennel*, there was *no challenge*: and the *whole* penalty was given to the informer, in that case.

As to *Wakeman v. Harris*---No *proper* bill of exceptions was tendered or signed: therefore they *could not* take advantage of the exceptions there.

Therefore he prayed that the judgment might be affirmed.

Mr. Davenport, in reply---It is *not necessary* for the court to *infer* here, that the treasurers *are trustees for the corporation*. No such thing appears upon the *record*.

As to *Hollings v. Hungerford*---The chamberlain was a *stranger* to the corporation. But if not, yet this has *never been objected* to the mayors of *London* bringing these actions.

As to commoners, parishioners, pilots, &c.---There the interest is considerable: here, it is nothing, or next to nothing.

This *custom does not depend* upon the success of *this* action.

They can make *no* effectual bye-law, if they can not support *this* bye-law.

All courts must *take notice* of their own customs: and their customs can be tried no where else.

1766.

HESKETH

v.

BRADDOCK.

But Mr. *Ashhurst* says "that if it can not be tried elsewhere, it is a bad bye-law."

Answer—The bye-law is a *good* bye-law: it is admitted to be so; and the case of *Bodrick v. Fennel* proves it.

Returns to writs of habeas corpus are as much in point, as other cases. And in the present case, there was a *procedendo* granted by the chancery court of Exchequer at Chester: * therefore those cases of *procedendos* are in point.

* This appears upon the record.

LORD MANSFIELD—We will look into the cases: and if we have any doubt, we will let you know; that it may be argued again. If we have no doubt, we will let you know our opinion.

I think this is the first case where the objection has been taken upon the record.

Cur advis. or Ulterius Concilium;
(eventually, as the court should direct.)

On Friday the 7th of February it was ordered to stand for judgment on Tuesday the 11th.

And now—

LORD MANSFIELD delivered the resolution of the court to the following effect.

This was an action of debt for the penalty of a bye-law, which the defendant was supposed to have incurred by keeping a shop within the city of *Chester*, not being a freeman.

The action was brought in the *portmote*-court, which is holden before the mayor; and was prosecuted by the plaintiffs, as treasurers of the city, (who are similar to chamberlains in other corporations.)

The declaration states a *custom* in the city of *Chester*, "that no person who is *not a freeman* could keep any "shop, or expose goods to sale by retail, within the "said city; excepting at fairs."

[1854] And then the bye-law is set forth: which ordains "that no person who is *not free* of the city, should sell "goods by retail, or keep any shop for a retail sale, "within the said city, excepting at fairs; upon pain "of forfeiting 5l. for every offence." This penalty is directed by the bye-law to be recovered by action of debt, to be prosecuted in the name of the treasurers of the city, in the *Portmote-court* to be holden before the mayor: and one third of the penalties (deducting the costs allotted to the poor prisoners in the *Northgate* gaol of that city; another third, to the person who should first give information of the offence; and the remaining third is left *undisposed of*. The declaration then charges, that the defendant had kept an open shop in the city, not being free: in violation of the custom and bye-law aforesaid: and therefore, the plaintiffs, being treasurers of the city, demand this penalty.

To this declaration the defendant pleaded "*nil debet*:"

and issue being joined thereupon, a *venire* was awarded to the *sheriffs of the city*, to return a jury of twelve free and lawful men *of the city*.

1766.

HESKETH

V:

BRADDOCK

When the jury were returned, the defendant *challenged the array*; because the *sheriffs* were *citizens and freemen*.

The plaintiffs demurred to the challenge: and the defendant joined in demurrer.

In this part of the record, an extraordinary entry is introduced, as a suggestion of the court, that it was *judicially taken notice of*, "that, *by the custom of the city*, "no person could *array any jury*, within the jurisdiction "of that court, but the *sheriffs or coroner of the city*, or "one of them:" and "that *none could be sheriffs or coroners, but citizens and freemen*."

After this suggestion, the court gave judgment on the challenge, "that the same should be *over-ruled*, and the "array *allowed*."

The defendant then challenged the *polls* of the jury; because they were, all of them, *freemen*.

And *this challenge* was also *disallowed*.

And thereupon, the jury (thus returned and objected to) proceeded to try the issue: and a verdict and judgment were given for the plaintiffs.

Upon this judgment, the defendant brought a writ of [1855] error in the court of pleas for the county palatine: and there the judgment of the *Portmote-court* was *reversed*.

And upon this judgment of reversal, the present writ of error was brought in *this court*.

THE ERRORS for which the judgment was reversed in the county-palatine court, were—

1st. Because the *two sheriffs* who returned the jury, and the *jurors themselves* were *freemen* of the city, and (as such) were *interested* in the matters to be tried; and therefore that the *challenges* were *erroneously over-ruled*: 2dly. That as it appears from the suggestion introduced into the record, "that in the *Portmote-court*, no jury could be returned, but *by sheriffs or coroners*, who are *freemen of the city*; the bye-law which *confines the action* to such "a jurisdiction (where the *sheriffs and jury must necessarily be interested*) is, in that respect, a *bad and illegal bye-law*."

In answer to these objections, it was argued for the The plaintiff's plaintiffs, "that neither the *sheriffs* nor the *jurors* were *argument* "interested at all, in the *present suit*."

It was admitted, "that where a corporation are *parties* "to the suit, or *immediately interested* in the very issue "in question, no freeman can be either a juror or a witness." *Co. Litt.* 157. 3 *Keble* 12, 295. But it was said, that, in *this case*, the corporation are *no parties* to the

1766.
HESKETH
V.
BRADDOCK.

action, nor *any way concerned* in the point in issue. That the suit is by the treasurers in their *separate* capacity; and, whatever be the event of it, the corporation can neither pay nor recover any *costs*. That in *this* action, the object of litigation is merely the *penalty* of the bye-law; and in that penalty, the corporation have *no share or interest*.

[1856] It was further argued, that though the bye-law is founded on a custom "to exclude all foreigners from the city;" and the freemen may be said to have an interest in that exclusion; yet this is a *remote* consideration, which, at most, can affect *only such* of the freemen, as happen to be *traders*. That the circumstance of a freeman's being a trader, is a particular *uncertain incident*; which, if it happens to occur in any of the jurors, might indeed warrant a challenge *for favour* (where the fact would be tried;) but that a *mere possibility* of such an interest is no sufficient ground for a *principal* challenge.

It was also observed, that the verdict for this penalty would not avail the corporation, in any suit upon the *custom*. For if the custom were to be litigated in a superior court, the corporation could not give this verdict in evidence.

And as to the *suggestion*—It was insisted, that *every court* must *judicially* take notice of their own customs: and, as none but freemen could possibly be either sheriffs or jurors, if the present objection should prevail, this bye-law would be left without a remedy to enforce it; and consequently there would be a failure of justice.

This is the substance of the arguments which were offered in support of the judgment of the *Portmote-court*.

But we are all very clearly of opinion, that in *this case* *neither* the *sheriffs* nor *jury* were competent; and therefore the challenge was *improperly over-ruled* at the *Portmote-court*.

There is no principle in the law more settled than this—That *any* degree, even the *smallest* degree of interest in the question depending, is a decisive objection to a witness, and much more to a *juror*, or to the *officer* by whom the jury is *returned*.

The law has so watchful an eye to the pure and unbiased administration of justice, that it will never trust the *passions* of mankind in the decision of any matter of right. If, therefore, the *sheriff*, a *juror* or a *witness* be in *any sort interested* in the matter to be tried, the law considers him as under an influence which may warp his integrity or pervert his judgment; and therefore will not trust him.

The *minuteness* of the interest will not relax the objection. For, the *degrees* of influence cannot be mea-

sured: no line can be drawn, but that of a total exclusion of *all* degrees whatsoever.

1766.

HESKETH
v.
BRADDOCK

In the present case, *every* member of the corporation was evidently interested in the very issue to be tried. For, the custom "to exclude all strangers from trading in "the city," is the main foundation of the action: it is the only ground upon which such a bye-law could, in any case, be valid. For, a bye-law "to exclude," *without* a custom to *support* it, would be void, as an illegal restraint upon the common right of the subject.

It was therefore necessary for the plaintiffs to alledge this custom in their declaration. And the defendant's plea of "*nil debet*" puts the *whole* declaration in issue. Upon that issue, the plaintiffs must *prove* the custom "to exclude," as well as the *bye-law*: and the jury must form their verdict upon the *whole*. For, *all* the facts alledged must *concur*, to prove the defendant indebted to the plaintiffs. *If* there was *no* such custom, the *bye-law* was a *nullity*; and consequently, the defendant could not owe the penalty.

[1857]

So that here *every* freeman was interested in the very issue to be tried. They may indeed, have no share in the penalty itself: but they are interested in the facts on *which* the penalty depends.

The exclusion of foreigners is a *MONOPOLY to the free-men themselves*. The enforcing of this exclusion, by bye-laws and penalties, is securing that monopoly. And in this action, the very freemen who were to gain by securing this monopoly, were the jury to determine it. Therefore *every* freeman had an interest and bias in the matter of the issue to be tried in this cause. [1 Wils. 234. 236, 237.]

It is no answer to the objection, to say "that they "were to have no part of the *penalty*:" for still they had a *bias* upon them in relation to the question to be tried. Whatever the action may be, if a juror be interested in *any* of the matters in issue, he is unfit to try them. The incapacity arises from his bias in the particular facts he is to try: and *whatever* be the facts which that bias touches, he is incapable of trying *those* facts.

In the case of *Day v. Savadge*, in *Hobart* 87. The suit was an action of trespass between two private persons. But an issue being taken upon a custom in *London* "for every freeman to be discharged of wharfage," the court would not suffer this custom to be proved by the Recorder: and on that occasion they held that "where "the issue *concerns* a corporation, though they be not "directly *parties* to the suit, if they are to make the panel, or any of their body are to go upon the jury, it is a "cause of challenge."

1766.
HESKETH
V.
BRADDOCK

None of the cases which Mr. *Davenport* has cited on the part of the plaintiff, come up to the present case. *Fanacker's* case was on a bye-law that affected their own members only; and where the parties on both sides were equally freemen.

[1858]
[S. C. 1 Wils.
233.]

In the case of *Bodwick v. Fennel*, it was stated at the bar, "that no exception or challenge was taken." And as a party may wave all exceptions, if he pleases; if he does not object, it is a virtual acquiescence.

[S. C. Sayer,
254.]

In *Wakeman v. Harris*, there was also no challenge; and the bill of exceptions was not sealed: and therefore the court could not take any notice of it.

[Vide Salk.
398.
1 Lev. 16.]

The case of the City of London v. Wood was cited on both sides. Mr. *Davenport* relied on the words of Lord Chief Baron *Ward*, that the objection to the mayor's sitting as judge in a cause of the corporation was not so much in point of interest, as inconsistency. But is not the interest a great ingredient in that inconsistency? And hence comes the rule "that no man shall be judge in his own cause." And the same rule will equally apply to a *juror*.

It was said, "that if the defendant's challenges be allowed, the corporation will be left without remedy on the bye-law."

The answer is, that if the fact be true "that they can impanel no jury but freemen," the fault was their own, in confining the action to their own court. On the other hand, if they had a power (as the city is a county of itself,) to have impanelled *non-freemen*, it was their own fault that they did not.

In the regulation of their own members, they may indeed make bye-laws, and enforce the observance of them by prosecutions amongst themselves; because every member of the corporation is bound by the jurisdiction into which he voluntarily enters; and being all of them freemen, their circumstances are equal. But if corporations were to try their own suits against strangers upon a bye-law "for excluding all traders but themselves," there would be an end of the distinction which has long been established, "that a bye-law which lays this restraint upon trade is void, unless there be a custom to support it."

If the custom be a necessary foundation for supporting such a bye-law, it is necessary to prove it. But if the freemen themselves might determine upon it, they would not be very exact in that proof; and bye-laws themselves, without any such custom, would soon have an equal effect.

Had this bye-law been general, without limiting the action to the treasurers, or to their own court, they might

then have tried it in a *superior* court; and the whole would have come to a proper decision. 1766.

Therefore we are all of opinion "that the judgment of the court of great sessions, reversing the judgment of the *Portmote*-court, ought to be affirmed."

JUDGMENT of the *Great Sessions* AFFIRMED.

REX *versus* INHABITANTS OF DUNCHURCH.

See this case ABRIDGED, in the TABLE: and at large, in the quarto-edition of my SETTLEMENT-CASES, No. 177. P. 553.

SIR GEORGE COLEBROOKE, Bart. *versus* ELLIOT

THIS was an action of debt brought, by the lord of the manor of *Stepney*, for an *amercement* set and affeered in the *court-leet* of that manor. *Nil debet* was pleaded; issue was taken thereon; the cause tried before Lord *Mansfield*; and a verdict found for the plaintiff. The leet hath jurisdiction in respect of loaves short of weight, under 31 Geo. 3.

On *Monday* the 27th of *January* 1766, Mr. *Bainham* moved on behalf of the defendant, for a new trial; reserving a claim to a future motion in arrest of judgment: and he now proposed no less than seven objections. But the discussion of them was adjourned to the following *Wednesday*. c. 29. but not on 3 Geo. 3. c. 11.

On which *Wednesday* (the 27th of *January* 1766) he was supported in his motion, by Mr. Serjeant *Burland*: and they obtained a

Rule to shew cause "why the verdict
"should not be set aside, and a new trial
"bad;" with liberty to move afterwards,
in arrest of judgment.

On *Saturday* the 8th of *February* 1766, Lord *Mansfield* reported the evidence given at the trial: and

Sir *Fletcher Norton*, Mr. *Morton*, and Mr. *Dunning* shewed cause why there should not be a new one.

They were answered by Serjeant *Burland*, Mr. *Stowe*, [1860] and Mr. *Bainham*.

Lord MANSFIELD said it would be proper to look into it: and it stood upon a

Curia advisare vult.

On *Wednesday* the 12th of *February* 1766,

Lord MANSFIELD delivered the resolution of the court, which was to the following effect.

This is an action of debt for *amercements* set and affeered in the *court-leet* belonging to the manor of *Stepney*.

The facts charged in the declaration and presentment (which is set forth in the declaration) is the defendant's having in his custody, and exposing to sale, a loaf of bread pretended to be and as and for a *quartern loaf* of [See Salk. 687. 1 Ed. Raym. 412.] 12 Mod. 242. 1 H. Bl. 169.

1766.
COLE-
BROOKE
v.
ELLIOTT.

* 13 E. 1.

the *weight* of 4lb. 5oz. and a half; whereas it *wanted* four ounces and a half. "*Nil debet*" was pleaded; and issue joined: the cause was tried; and a verdict given for the plaintiff.

Upon the trial it was objected, "that the presentment given in evidence was neither *sealed nor indented*, as it ought to have been by the statutes of *Westm. 2. c. 13,** and 1 *Edw. 3. Stat. 2. c. 17.*"

Leave was then given to the defendant, to move for a new trial, *without* payment of costs.

Afterwards, another objection was taken here at the bar, "that the *court-leet* had *no jurisdiction*."

Some other objections were also taken; which have been since dropped.

In our opinion, it is *not necessary* that a presentment of this kind should be either *sealed or indented*.

The *turn*, and the *leet* (derived out of it) were anciently the principal courts of criminal jurisdiction; coeval with the establishment of the *Saxons* here. There were no traces of them, either amongst the *Romans* or *Britons*: but the activity of those courts is marked very visibly both amongst the *Saxons* and the *Danes*.

[1861] By *Magna Charta*, cap. 17. their jurisdiction is *abridged*; their power "to *hear and determine*" is taken away; but *not* their power "to *take indictments*, and *apprehend* the "parties indicted."

[2 East. 61.]

That power was abused. They took people up, to extort money from them, upon pretence of their having been indicted in their turns *de furtis et aliis malefactis*, when in fact they had *not* been lawfully indicted. The statute of *Westm. 2. c. 13*, recites that grievance; and directs that sheriffs in their turns shall inquire by twelve lawful men, at the least, *de hujusmodi malefactoribus; qui hujusmodi inquisitionibus sigilla sua apponant: et sicut dictum est de vicecomitibus, observetur de quolibet ballivo libertatis*. And 2 *Inst.* 388. says "this act *extends to leets*;" and it certainly does. But it respects *only such* inquisitions, as are a foundation for *imprisonment*. That was the grievance intended to be obviated—to prevent fictitious imprisonment, upon pretence of inquisitions *de furtis et aliis malefactis*. The act does not relate to inquisitions for offences where the party *cannot be apprehended*, but the proceeding against him is *only by amercement*; where the delinquent can either be taken up in the *first* instance, or *even punished* for the offence by imprisonment.

The *universal PRACTICE* is *NOT to seal* these inquisitions.

And as to the *indenting*—It is *not necessary* that *such* an inquisition should be *indented*. The act of 1 *Edw.*

3.* extends to courts leet: but the *reason* of the law fixes the *true construction* of it. It was made, to prevent the altering or embezzling *such indictments* as were to be delivered over to the justices: it does not relate, therefore, to *presentments*, which were to be proceeded upon in the turn or leet, and *not* to be delivered over to the justices.

1766.
COLE-
BROOKE
V.
ELLIOTT.
* Stat. 2.
cap. 17.
[Dalt. Sher.
389.]

But it was not necessary to have determined these points; because we are ALL of opinion "that the offence presented is not within the JURISDICTION of the court LEET; because it is a *new offence, created by act of parliament*, and can be prosecuted *only* in the manner directed by the act."

THE ASSIZE OF BREAD is an ordinance ascertaining the weight, and the price of it, which is to be regulated by the price of corn. The intention was, to preserve a due proportion between them; making the baker a reasonable allowance: (a very wise provision, to derive the effects of plenty upon the poor.)

If that assize was *broken*, (whether set by the court leet, or not,) the breach of it was always *presentable* and *punishable* in the court LEET. But the assize must fix both PRICE and WEIGHT: and it would be very incomplete and imperfect, if it were to fix *only the weight*, and leave the price with a seller. [1862]

The 51 H. 3. (*assisa panis et cervisie*) fixes both: and the variations in that assize, occasioned by the different prices of corn, always took in both.

The 8 Ann. c. 18. repeals the 51 H. 3. but directs how the assize shall be set; and exhibits a plan for that purpose. But it takes in *both the price and weight*, according to the true principle of the law.

The 31 G. 2. c. 29. repeals *all* former laws; but still proceeds upon the same principle of fixing both the price and weight: and the plan of an assize exhibited in it, shews that both are fixed by it. This act saves the jurisdiction of courts leet: and therefore, whenever and wherever an assize is made according to the directions of 31 G. 2. (c. 29.) the court leet may inquire and punish for the breach of it.

But the 3 G. 3. c. 11. upon which this presentment is grafted, *does not fix the price*; but was made, to meet with some inconveniences in cases where *no assize was set*; whereas the setting the assize is the BASIS of the jurisdiction of the court leet. If we should support this presentment, it would be giving them a jurisdiction where *no assize is set*; though their jurisdiction arises only and *can only attach, where it is set*. [Setting the assize, the basis of the jurisdiction of the leet.]

The offence, cognizable there, is FRACTIO ASSIZE.

The counsel for the plaintiff were aware of the objec-

1766.
COLE-
BROOKE
V.
ELLIOTT.

tion ; and therefore insisted " that this act of 3 G. 3. is " an assize ; because it fixes the *weight*." (a)

But it *wants* one of the essential characteristics of an assize, PRICE ; price regulated by the price of corn in the market. And it would be a strange construction of this act, to give it the effect and operation of an assize, when it was intended only to supply the *defects* of an assize, and to operate *where* and *because* there was none.

[1863]
* V. sect. 6.

The act directs, * that a quartern loaf shall be four pounds five ounces and an half ; under the penalty of not more than five shillings nor less than one shilling for every ounce of every loaf which shall be deficient ; and not more than two shillings and sixpence, nor less than sixpence for any defect under an ounce, but, in

(a) Assize is sometimes taken for an ordinance for putting things into a certain rule and disposition, 4 *Com. Dig.* 104. (B. 94.) and *Lit. Sec.* 234. is there cited. *Littleton*, at the end of *sect.* 234. is thus, *viz.* " Sometimes assize is " taken for an ordinance, to wit, to put certain things " into a certain rule and disposition, as an ordinance which " is called *assisa panis et cervise*."

The assize of bread is broke when bread is not made according to the size or quantity limited by some ordinance. 4 *Com. Dig.* 128. (L. 8.) *Lit. s.* 234.

In 1 *Wils.* 248. an action of debt was brought for an amercement in a court leet : the declaration set forth a custom for six ale-conners to be appointed by the steward to view, search into, and weigh all the loaves of bread within the manor, not exceeding threepenny loaves, or half quartern loaves, to see whether the same be of due weight, and are to present every baker whose bread is found wanting in its due weight, and to present bakers hindering them from searching, after request : that the defendant was an inhabitant within the manor, that six ale-conners were sworn at the leet, and afterwards went to the defendant's house to weigh the bread, and then state a presentment, amercement, and affeerment to a certain sum : Mr. Jodrel for the defendant, page 251. admitted the ale-conners had power to perambulate the leet, and might buy the defendant's bread, and if under weight convict him in the leet by a proper jury, but denied the legality of the custom to enter the defendant's house.

But no judgment nor any opinion was given by the court as to the amercement ; but there were two other counts, and the judgment was given only upon the last, which was debt on a *mutuatus*.

cities, towns corporate, &c. or within the weekly bills of mortality, the complaint must be made, and the bread weighed, within twenty-four hours; and in other places, within three days: and a summary jurisdiction is given to justices, to convict and levy the penalty.

It is unnecessary to speculate upon the *utility* of the regulation. So far it goes, that when a person buys a quartern loaf, it must *weigh 4lb. 5oz. and a half*: but, as it does not fix the *price* of that quartern loaf, it reaches *only one half* of the evil.

But whatever benefit may arise from this provision, it is *not* a provision made by the *common law*; but *introduced by this statute*: and the presentment describes the offence in the very *words of the statute*; and was plainly meant to enforce the execution of the statute, and to apply the right of punishing for the breach of the assize, to the punishment of a violation of an act of parliament.

The bread must be *weighed* in twenty-four hours or *three days*; whereas, this presentment may punish at *three months* distance. The act says, "he shall be *summoned*, ‡ and have an *opportunity* of making his defence." The presentment can not be controverted in the court leet; but accuses and punishes, at the *same instant*. ‡ V. sect. 14.

There is a *saving* of the jurisdiction of the *leet*, in the 31 G. 2. † Because that act keeps an assize in its view, † Sect. 43. from one end to the other; and the settling that assize is the great object of it. But in *this* act there is *no* such exception; because it was providing for cases where the court leet had *no jurisdiction*.

These courts were very properly adapted to the customs, manners, genius, and policy of a people upon their first settlement: but, like all other human jurisdictions, vary in the course and progress of time, as the government and manners of a people take a different turn, and fall under different circumstances.

From *magna charta* to this time, they have been always gradually *abridged*; *never enlarged*. Experience shews the wisdom of widening (instead of contracting) the circle of both civil and criminal jurisdiction. [1864]

But the point is not, now, upon *abridging* the jurisdiction of the leet: the present question is "whether we shall *increase* it, and give them power to hold plea of "an offence against an act of parliament, which is formed upon a plan that has been uniformly and universally pursued from the conquest to this day." (b)

(b) By 1 Jac. 1. c. 22, several new regulations are made concerning tanners, curriers, shoe makers, and

1766.
COLE-
BROOKE
V.
ELLIOTT.

1766.

COLE-
BROOKE

v.

ELLIOTT.

UPON the *first* and other objections (which were waved,) I gave leave to move for a new trial, *without* costs. The *second* objection was not then made. As it *now* comes out, the defendant should have had a verdict; which would have *carried* costs.

The plaintiff could not have maintained his action of debt for this amercement; because, it appears upon the whole of the case, that there is *no debt due* to him. The plea of *nil debet* puts the whole matter in issue: and upon the *whole* matter, nothing is due to the plaintiff.

But the defendant can not have any *costs*, under the *present form* of proceeding. Here is *no demurrer*; but a *verdict against him*: nor did he insist at the trial upon a *case* to be stated for the opinion of the court. So that there can be no possibility of entering a verdict *for* him, nor can the court give judgment *for* him. All we can do, is to set aside the verdict *against* him, and grant him a new trial.

Therefore— Let this verdict be set aside, and a New trial had, *WITHOUT costs*.

HIS LORDSHIP then addressing himself to the defendant's counsel, said—In the shape it now stands, you can not *have costs*. You may take it *either* of these two ways; *either* as I have just now pronounced the rule, or by having judgment arrested: but you *can not have costs*. The truth of the matter is, the defendant suffers by a *slip*; by not seeing the objection sooner. If he had seen it sooner, he might have demurred, instead of pleading "*nil debet*:" and then he would been intitled to his costs. But this he has *not* done.

It was very properly laboured by the counsel for the plaintiff, as upon an assize set by 3 G. 3: for it is certain—

other artificers, occupying the cutting of leather; and several new penalties are inflicted for offences against that act; and by sect. 32, power is given to lords of liberties, fairs and markets, to appoint searchers and sealers; and by sect. 50. power is given to all justices of assize, of gaol delivery, and to all stewards of franchises, LEETS, and law days, within their jurisdictions, to inquire of all the premises in their sessions, LEET, or law days, and, to hear and determine the same; and also by their discretions examine all persons suspected to offend against this act, or any parcel thereof; and many acts long since *magna charta* have given the leet a jurisdiction where they had it not at common law.

ly necessary "that *an assize should be set*, in order to support this action."

THE COUNSEL *for the defendant* chose to take the rule as it was before pronounced; *viz.*

That the verdict be set aside,
And that there be a new trial;
But *without* payment of costs.

1766.
COLE-
BROOKE
V.
ELLIOTT.

REX *versus* INHABITANTS OF STAUNTON under BARDON.

See this case *abridged*, in the TABLE; and *at large* in the quarto-edition of my SETTLEMENT-CASES, No. 178. page 558.

. The End of *Hilary* Term 1766, 6 G. 3.

1866

EASTER TERM,

6 GEO. III. B. R. 1766.

Friday, 18th
April, 1766.

[S. C. 1 Bl.
591.

A corporation
disabled to
act taking a
new charter
become a cor-
poration
again the
same as the
old one.

MAYOR and COMMONALTY of COLCHESTER *versus* SEABER, Executor of WILLIAM SEABER his late FATHER.

THIS was an action of debt brought upon a bond in the penalty of fifty pounds, dated 28th September 1735, conditioned for one *John Bennall's* repayment of 25l. then advanced to the said *John Bennall*, by the corporation of *Colchester* (according to the intent of Sir *Thomas White*, knt. deceased, and of certain articles, &c.) at the expiration of ten years: for the payment whereof, *William Seaber*, the defendant's father, was one of this *John Bennall's* sureties.

The defendant pleaded "*non est factum testatoris*:" and thereupon issue was joined.

The cause (a) was tried before Lord *Mansfield* at *Westminster*, at the sitting after last *Michaelmas* term, when a verdict was agreed to be given for the plaintiffs, subject to the opinion of this court upon the following facts, admitted by the counsel on both sides, viz.

That *Colchester* is a borough by prescription. (b)

That by letters patent, dated 6th December, 1 Ric. 1. Power was given to the burgesses to appoint, from amongst themselves, their own bailiffs and justices: and by letters patent dated 1st March, 1 Ed. 4, they (the bailiffs and burgesses) were incorporated, and made to consist of two bailiffs and one commonalty, in perpetual succession.

(a) See 2 *East*. 82. 2 *Durn*. 524, 547. 3 *Durn*. 207, 215, 224, 231. 6 *Fin*. 284. 2 *Doug*. 25, 37.

(b) By 2 *W. and M.* sess. 1. c. 8. s. 3, it is declared and enacted "that the mayor, commonalty and citizens of the city of *London*, shall for ever thereafter be and prescribe to be a body corporate without any seizure or forejudger, or being thereof excluded or ousted, for or upon any pretence of any forfeiture or misdemeanor at any time theretofore or thereafter to be done, committed, or suffered."

That in 15 C. 2. by letters patent dated 3d August in that year, the free burgesses were made one body corporate and politic by the name of "mayor and commonalty of the borough," to consist of one mayor, (to be chosen annually from amongst the aldermen,) eleven aldermen, eighteen assistants, and eighteen common council: and that this charter was confirmed by letters patent dated 27th July 5 W. & M. to the mayor and commonalty and their successors.

1765.
MAYOR, &c.
OF COL-
CHESTER
V.
SEABER.
[8 Mod. 378.]

That on 28th September 1735, William Seaber, the defendant's testator, duly executed the bond to the said mayor and commonalty, upon which the present action is brought.

That in 1740, there were judgments of ouster against all the persons then claiming in fact to be mayor and aldermen of the said corporation.

That the said persons were all dead before the year 1763.

That from the year 1740 to 1763, no person, in fact, took upon himself or claimed to be a mayor or alderman of the said corporation.

That in 1763, the *present* charter was granted and accepted; and has been acted under, ever since.

* It is dated
9th September,
5 G. 3.

The question was—"whether the *present* corporation could maintain this action."

Sir Fletcher Norton argued for the plaintiffs.

This depends upon the question "whether the *old* corporation was *dissolved* in 1763;" (though perhaps the action may be maintained under the *new* charter.)

An old corporation can be *dissolved* but by three ways; 1st. by *abuser* or *misuser*; and thereby a *forfeiture*. 4 Mod. 52, Sir James Smith's case, 2 Inst. 222; 2dly. By *surrender*, accepted on *record*; 3dly. By the *real death* of all the natural members. 1 Ro. Abr. 514. title *Corporations*, letter I.

[Salk. 190,
191.
8 Mod. 361.]

Now *this* corporation was not dissolved (in 1763) by any of these three ways.

1st. Not by forfeiture. The *usurpation of individuals* can not dissolve the body.

2dly. Not by surrender. The only colour of pretence for *that*, is a recital in the charter of 3 Geo. 3. "That it has been represented to the crown, that the said corporation is now dissolved, or at least incapable of enjoying and exercising their said liberties and franchises."

[1868]

3dly. Nor by the natural death of *all* the members: for the special case only finds "that the ousted mayor and aldermen were dead." But the rest of the corporation (the burgesses, &c.) were *not* dead in 1763.

Then, though this new charter gives a mayor, aldermen, assistants, and common council, to the two former

1766. integral parts, the mayor and commonalty; yet it is no more than the charter of 15 C. 2, had done: for that charter gave those very two new integral parts, to the then burgesses. And this *new* charter shall not *take away* the rights of the *old* corporation. All the court held the old power to remain in *Raym.* 439, *Haddock's* case—"For the charter does not merge or extinguish any of the ancient privileges; but the corporation may use them as before." If it should be otherwise, it would be very mischievous to most of the corporations in *England*, who have taken new charters, but were ancient corporations before." And in the case in 3 *Leo.* 238, of the *Mayor, aldermen, and burgesses of Scarborough* versus *Butler*, which was an action brought by the corporation by this their *new* name, for a debt which had originally become due to the *old* corporation by the name of bailiff, &c. and judgment was given for the plaintiffs: and at the end of the case, it is said that "no doubt was made of the debt due to the first corporation *remaining* due to the new, *after* the names changed by the letters patent."

MAYOR, &c.
of COLCHES-
TER
v.
SEABER.

* V. 1 Ventr.
355. S. C.
accord.

Consequently, this bond is good; and the action upon it, maintainable.

But even *supposing* the corporation to have been dissolved—*Lands* would indeed revert to the grantor: (1 *Ro. Abr.* 816. title *Escheat*, letter A. pl. 2, 3.) But *goods and chattels* would go to the crown. And the crown have granted them, by the new charter, in as full and ample a manner as words can express.

Mr. *Dunning*, *contra*, for the defendant.

This is a *new* corporation totally *distinct* from the old one.

[1869] This bond is a *chose in action*: and therefore, though I were to admit that it was granted to them by the crown by the new charter, as a chattel devolved upon it by a former dissolution, yet the *new* corporation could not bring the action in their *own* names. But they have not recited any such grant. They have declared upon this bond, as a bond given to the *present* plaintiffs.

The question is, whether the corporation *to whom* this bond was given does still *exist*.

I do not say that the corporation was dissolved by either forfeiture or the natural death of all the members: nor do I say that the acceptance of a new charter amounts to a surrender of former rights compatible with the new grant.

But I say that it was dissolved by being rendered incapable of exercising any of its functions.

The facts stated in the case shew that the bond was given to a corporation *consisting* of a *mayor, aldermen* and

commonalty.* Now *one* (at least) of these integral vital parts being *extinct*, the body is *dead*. And this corporation could not, by any power of its own, be re-animated.

The mayor is to be chosen out of the aldermen; and as there remained neither mayor nor aldermen, two integral parts were *irrecoverably gone*; and the remaining common burgesses (if any such did in fact remain) could not create either an alderman or a mayor, under their former constitution.

This therefore is, in point of *law*, a DISSOLUTION; and as much so as if *all* the corporators were actually dead.

And this was the state of the corporation for above twenty years. Whereupon the crown, in 1763, *created* a new corporation.

And the crown could grant no more rights than they had.

Sir Fletcher Norton, in reply—

This is not a case of the *death* of every natural member: *many* of them are still living. The old *root* therefore remains. And I say, the corporation is *not dissolved*; though some of the *limbs* are irrecoverably lopt off: and I say too, that the mayor and aldermen are *not vital parts*, but only like *limbs* to the natural body.

If it were so, "that the loss of a limb would be fatal to the corporate body," every corporation which, before 11 G. 1. had slipt the annual election of a mayor, would have become irrecoverably dead and dissolved.

These limbs are not *vital* parts, as to *this* matter. The other members remain intitled to their *estates* and *rights*: and they still proceeded to elect members to parliament. The *constitution* was left: *that* was not dissolved. And the new charter put it into *action* again.

The *new* and the *old* corporation have the *same name*: therefore this makes no difference in the action, nor in the declaration. They have declared rightly and properly: and could not have declared otherwise.

" mayor and commonalty of the borough of Colchester in the county of Essex."

1766.

MAYOR, &c.
OF COL-
CHESTER
V.

SEABER.

The words of the bond — "bound unto the mayor and commonalty of the borough of Colchester in the county of Essex." [See 6 Vin. 383. pl. 25.]

[1870]

LORD MANSFIELD—*Many* corporations for want of legal magistrates have lost their activity, and obtained new charters. *Maidstone*, *Radnor*, *Curmarthen*, and many more are in the same case with *Colchester*. And yet it has never been disputed, but that the new charters revive and give activity to the old corporation; except, perhaps, in that case in *Levinz*, where the corporation had a *new name*; and even there, the *court* made no doubt.† Where the question has arisen upon any re-

* The new charter incorporates the free burgesses by the name of "the
+ V. ante, p. 1868.

markable metamorphoses, it has always been deter-

1766. mined "that they remain the same, as to *debts* and
 MAYOR, &C. "*rights*."
 of COL- It now comes on, as a question, "whether the old
 CHESTER corporation exists after this judgment of ouster against
 V. "the mayor and all the aldermen, and the new charter."
 SEABER. And it is argued, "that this new corporation is totally
 [2 Durn. 534.] "distinct from the old one."

But there is no authority, (c) no *dictum* for it: and the consequences are obvious, and would be most inconvenient.

[3 Durn. 241.] Without an *express* authority, so strong as not to be gotten over, we ought not to determine a case so much *against reason*, as that the parliament should be obliged to interfere to set it right.

The corporation is *not dissolved* by the judgments of ouster and subsequent deaths of the mayor and aldermen; though they are without their magistracy: their *constitution* is not destroyed and gone. Their former *rights* remain. Would not a freeman of *Colchester* still continue to have a right to *common*? or to vote for members to *parliament*?

[Qu. 6 Vin.
283. pl. 25.]
[1871]

So it stands upon *general reason*. And Sir *James Smith's* case in 1 *Show.* 274. and in 4 *Mod.* 52. is in point,

(c) There are many authorities, or at least dicta of judges, that before the statute 11 G. 1. if a corporation lapsed the time appointed by the charter for choosing the mayor or other head officer, the corporation was dissolved, unless there was a provision in the charter for the old mayor to hold over. 10 *Mod.* 346. 8 *Mod.* 36, 129. And the preamble of the statute 11 G. 1. c. 4. as well as the enacting part thereof seems founded on that supposition, and applies a remedy to that mischief, and Lord *Hardwicke* in *Cases temp. Hardw.* 178. was of that opinion; and so was *Page J.* *Ib.* 179. and *Ryder Ch. J.* in *Sayer's Rep.* 213. must have been clearly of the same opinion; for he held if the electors of the mayor are reduced below a sufficient number for choosing a mayor, that the corporation would be dissolved even since the statute; and as to any objection against these opinions that if the law was so, then every corporation would be dissolved by the death or removal of the mayor, the answer is, that in such a case the corporation would have a power as an incident to their being, to choose a new mayor, even though no provision was made for it by the charter. 8 *Mod.* 129. And if the charter gives a power on death or removal of an officer to elect another within eight days, yet they may elect one at any other time. 1 *Roll. Abr.* 513, 514.

"that the corporation is not dissolved by the judgment." Notwithstanding this judgment of ouster, a *right* may remain, so as to be capable of being again *raised* and *revived*. The corporation cannot *act* without legal magistrates: but their *rights* may be *revived*, and put in *action* again, by a new charter from the crown, giving them legal magistrates.

I am clear, upon principles of law, that the old corporation was *not* absolutely dissolved and annihilated, though they had lost their magistrates; and that by virtue of the new charter they are so revived as to be *entitled to the credits*, and *liable to the debts* of the old corporation. (*d*)

Where there is a judgment against the *corporation itself*, the cases would be of a different consideration.

Mr. Justice WILMOT concurred—Wherever a corporation accepts a new charter, it *remains*, to every intent and purpose, as it did before, *though* the name be altered. *Haddock's case* in Sir T. Raym. 439. is in point, on this head.

The case of the corporation of *Scarborough* in 3 *Levinz*, 238, is also very strong upon a new charter. There the action was brought by the corporation by the *new* name. And the book says "there was no doubt made of it."

Then, the law being clear, "that a new charter does *not* destroy the right of the old corporation," the question is "whether this corporation was dissolved by the judgment of ouster against *individuals*."

Clearly, it is *not*. The difference is between a judgment against the *corporation ITSELF*, (for that *may* be a forfeiture,) and a judgment of ouster against *individuals*. God forbid that the rights of the *innocent (e)* should be lost and destroyed by the offence of *individuals*!

(*d*) Lord *Mansfield* did not say in this case that the corporation could act, or that it was not dissolved to some purposes, but only that the king might renovate it, and when renovated all the former rights would revive and attach on the new corporation. *Per Ld. Kenyon* in 3 *Durf.* 241.

(*e*) The rightful members of the corporation might by legal proceedings have prevented the corporation's falling into the state it was in, and therefore if they were to suffer, it would be owing to their own fault, in not pursuing proper measures for removing the persons who got illegally into the corporation, and getting others legally elected; and there is no right which may not be

1766.
MAYOR, & C.
of COL-
CHESTER
V.
SEABER.

Before the act of 11 G. 1. c. 4. (which took its rise from a case of the corporation of *Banbury*.) the corporation that had slipt the time of election of their chief officer could not proceed by their *own* power: but the king might have given them the power, by *reviving and reanimating* them. The corporation only lay *dormant and quiescent*, till *revived and restored* to their activity.

And here the crown have *restored and revived* all the rights and privileges of this corporation.

The consequences, if it were otherwise, would be fatal: I mean, if the rights of *common*, of election to *parliament*, and *other rights* of 500 innocent persons were to lie at the mercy of *some* of the members only.

Therefore judgment must be for the plaintiffs.

Mr. Justice YATES concurred, "that the corporation could not be dissolved, by a judgment against *individuals*."

* V. 4 Mod. 58.
and 1 Shower,
278 to 281.

A distinction was made, in Sir James Smith's case,* between a judgment against the corporation itself, and a judgment against particular members of it.

Colchester is a borough by *prescription*: and they are afterwards incorporated by such and such names, &c. and the officers given to them. But the *removal of their officers* cannot extinguish their rights: no more can the *change of their name*; as it is laid down in *Luttrell's case*, 4 Co. 87. *b.* expressly.

As to the debt now demanded---The *Scarborough case* in 3 Lev. 237, 238. is very applicable. There, the name in which the action was brought was the *new* name.

In 1 *Lutw.* 508. *Knight et ux v. Corporation of Wells*, where the corporation were sued by their old name, the objection was made to the *name* only; none at all, to the *action*.

As to the retaining rights of common and other rights---He mentioned the case of *Mellor v. Spiteman*, in 1 *Saund.* 343, where it was agreed "that a corporation, by the change or alteration of the name of the corporation, does not lose their franchises."

Old *rights* must *remain*; it would be very unreasonable, if it should be otherwise.

Mr. Justice ASTON declared his concurrence; and that he founded it upon 4 Co. 87. *Luttrell's case*, and *Haddock's case*, in 1 *Vent.* 355. and *Raymond*, 439.

[1873]

As to the statute of 11 G. 1. c. 4.---The intent of it was not to consider such corporations as dissolved, and to grant them *new* powers, or, as it were, *new* charters, as bodies

lost by the offence of others and the acquiescence of those who are injured by it.

dissolved; but to *revive their activity*, and to put them *again in motion*.

Though a new charter should grant *new rights*, or a *new name*, yet the acceptance of it does *not* destroy the *former* rights, privileges or franchises of the corporation: but the corporation may use and enjoy them, as they did before. This is expressly laid down in 4 Co. 86. *Luttrell's case*, and in *Haddock's case*, *Raym.* 439.

It has formerly been doubted, "in *which* of the names " the *action* should be brought:" but of late, the *new* name has been thought the most proper to be used.

He was therefore of opinion with Lord *Mansfield* and the rest of the court, that in the present case, the corporation was *not* dissolved; and that the judgment ought to be for the plaintiffs.

Mr. Justice WILMOT—In those cases of non-elections upon the fixed day, before 11 G. 1. c. 4, the corporation having slipt their day or time of election, the nomination remained in the crown: so that that was just the same case then, as this is now.

RULE—(by the unanimous opinion of the court) that the *POSTEA* be delivered to the PLAINTIFFS.

CHAVE *versus* PETER CALMEL, Esq.

Monday, 21st
April, 1766.
Tithes lie in
grant.

SIR *Fletcher Norton* shewed cause against a prohibition to the consistorial court of the bishop of *Exeter*, to stay their proceeding in a cause instituted there, for subduction of tithes.

The short of the case was (as it appeared to the court) that *Carmel*, the impropiator, had employed one *Finnimore* as his agent, to collect and compound for tithes. The plaintiff in prohibition (*Chave*, the occupier,) had agreed [by parol] with *Finnimore*, after the corn was cut and ready to be housed, for 5*l*. Whereupon he housed his whole crop, without setting out the tithes. *Chave's* agreement with *Finnimore* was only by *parol*. The impropiator libeled in the ecclesiastical court against *Chave*, for not setting out his tithes. The defendant below, (*Chave*, the occupier) tendered the 5*l*. and offered a plea "that he " had *purchased* the tithes, for five pounds." The ecclesiastical court *rejected* this plea.

Mr. *Thurlow* and Mr. *Dunning* were for the rule.

The only question was "whether this was matter of " *appeal*, or of *prohibition*."

THE COURT were unanimous in the *latter* opinion. And they founded it upon this rejection of the plea being a *grazamen irreparabile*; and upon an apprehension "that the ecclesiastical court must have grounded their

1766.

MAYOR, &c.
OF COL-
CHESTER
V.
SEABER.

[1874]

1766.

CHAVE
v.

CALMEL.

† Noy, 19.

Spencer's

case, and

2 Ventris 48.

Sed qu.

[For there is

no such thing

nor any thing

like it either

in Noy, 19. or

2 Vern. 48.]

[*Same prin-

ciple, Carth.

145. Vin.

Prohi. (Q.) Ld.

Raym. 221.]

"rejection upon a supposed difference between *their* law and *ours*;" that is to say, they took it for granted, that the ecclesiastical court were of opinion, agreeable to what is laid down by their favourite writer, *Gibson* (who takes it from a note in *Noy* 19. † ("That an agreement "with the *agent* of a proprietor of tithes will *not* bind the "proprietor:" whereas, by our law, and in common sense and common justice, a composition by the occupier with the agent of the proprietor *does* bind and *ought* to bind his principal.

*Indeed, where the ecclesiastical court have jurisdiction, and proceed therein according to their law, where it does *not* differ from ours, the rejection of a plea would be matter of *appeal*.

But where the ecclesiastical law *differs* from the common law; and the ecclesiastical court would require *greater proof* from the defendant below, than the common law requires; or would esteem an agreement *not* to bind the impropriator, which at common law *would* bind him; there an appeal could be of *no service* to the defendant in the ecclesiastical court; because the superior ecclesiastical court would *equally adhere* to their *own* law, as the inferior ecclesiastical court had done; and would determine alike, as being guided by the *same* principle of determination.

Therefore, as the judges of this court supposed that in the present case the judge of the consistory court rejected the plea, *because* he thought the agreement with the agent *not* binding upon Mr. *Calmel* the principal, which at common law *did* bind him, they held this to be matter of *prohibition*, and not of appeal.

And though it had been observed "that tithes lie in *grant*," yet they had no doubt that the occupier might, with sufficient propriety, be said to have *PURCHASED* these tithes, notwithstanding the contract was only by *PAROL*. For, whatever might have been objected to its not being by deed, *if* this corn had been standing; or *if* it had been a sale by the proprietor of the tithes to a *third* person; yet the *present* case is by no means liable to such an objection: for the corn was here *severed* from the ground, and ready to be housed; and it was not a *sale* of the tithes by the proprietor to a *stranger*, but a *composition* between the proprietor and occupier, *pro hoc vice tantum*.

[1875]

RULE for PROHIBITION made absolute.

1766.

DR. BETTESWORTH *versus* HUGH PARKER BELL, Esq.

MR. Serjeant *Whitaker* had moved to set aside a *habeas corpus cum causa, ad faciendum et recipiendum, &c.* directed to the gaoler of *Ailesbury*, returnable *before the chief justice, immediatè*.

His 1st objection was that such a writ can not be made returnable *immediatè*, nor *before the chief justice*: for by a rule made in 1654,* No *habeas corpus ad faciendum et recipiendum, &c.* can be returnable but *in court*, and at a day *in term*; except in *London* and *Middlesex*.

Hab. corp. "to do and receive" may be returnable immediately before a judge.

* There is such a rule Michaelmas term, 1654, section 7.

"That a *habeas corpus cum causa ad satisfaciendum et recipiendum* sheriff other than *London* or *Middlesex* not to be returnable *immediatè* or in the vacation-time, but at a day certain in court, in the term; unless it be to deliver over to prison, in discharge of his bail."

2d objection. It is contrary to the statute of 4, 5 *W. & M. c. 21*, "for delivering declarations to prisoners:" † For they have already declared against him in custody of the sheriff of *Bucks*.

† This act (s. 2 & 3.) gives leave to declare

Sir *Fletcher Norton* now shewed cause.

1st. This writ issued *in term*: it is tested the 11th of *February*: and it is and ought to be returnable *immediatè*; which only means within *due and convenient time*.

against prisoners in custody of gaolers: alleging "in custody of what sheriff or other person, &c. the prisoner is."

2dly. By 4, 5 *W. & M. c. 21*, the plaintiff may declare against a person in custody of the sheriff: and we have done so. But it does not follow, that we can not afterwards remove him.

That act was made *in ease* and for the benefit of plaintiffs: and so the preamble expressly declares. It only permits the plaintiff to charge the defendant in custody of the sheriff: it does not hinder from removing him afterwards.

[1876]

This is a mere matter of *practice*: and the practice is agreeable to what is here done.

Mr. Serjeant *Whitaker*, in reply—1st. As to being tested within the term—It is necessary that every writ should be so. But it was not *delivered* till the 3d of *March*: It must be returnable at a day *in term*.

2dly. After charging him with a declaration in custody of the sheriff of *Bucks*, they can not remove him by *habeas corpus*, till after judgment.

Mr. Justice *WILMOT*—There is no foundation for setting this writ aside. It is tested *in term*: which it ought to be.

The rule is an old rule made in 1654; and seems to have gone in *desuetudinem*. It was made long before the act of 4, 5 *W. & M.* And that act only gives the plaintiff leave to declare against him in custody of the sheriff: it

1766.
BETTES-
WORTH
v.
BELL.

does not take away the plaintiff's common law right "to remove him." He has a prior right to it: and the act leaves him, as it found him, in *that* respect.

Mr. Justice YATES concurred.

The rule made in 1634 does not apply, since the statute of 4, 5 *W. & M.* which takes away the *reason* of it. It does not stand in the way of this *habens corpus*, now. And even under that rule, there is an exception where it is to deliver over to prison in discharge of bail.

2dly. The plaintiff has a right to change the custody of the defendant into that of the proper officer of this court.

I am of opinion it is right.

Mr. Justice ASTON concurred.

1st. The old rule seems to have been totally *disused*.

2dly. That act of 4, *W. & M.* leaves the plaintiff as it found him. He is not precluded, by having charged him with a declaration, in custody of the *sheriff*, from afterwards removing him into the custody of the officer of this court.

[1877]

Per Cur—

MOTION DENIED; and the defendant committed to the custody of the marshal.

Saturday, 26th
April 1766.

REX versus INHABITANTS OF INGLETON.

See this case ABRIDGED, in the table; and *at large* in the quarto-edition of my SETTLEMENT-CASES, No. 179. Pa. 560.

Monday, 28th
April 1766.

REX versus THE RECTOR OF ST. ANNE'S (SOHO.)

Mandamus to a rector to appoint a parish clerk.

* A private act of parliament, temp. Car. 2.

SIR Fletcher Norton, on behalf of Dr. Jackson, shewed cause against a *mandamus* prayed to be directed to the rector of St. Anne's within the liberty of Westminster, requiring him to nominate and appoint a *parish-clerk* for the said parish, according to the form of a * statute in such case made and provided; in the room of ——— *Pynyot* deceased.

He said, Dr. Jackson had been already nominated and appointed by the rector, (Dr. Samuel Squire, Bishop of St. David's.)

Mr. Serjeant Glynn, *contra*, objected that Dr. Jackson was nominated by the RECTOR, *only*: whereas by the act of parliament, the *consent of the vestry* is necessary to confirm the rector's nomination or appointment; which consent and approbation of the parish has *not been given*.

Therefore it is *no election*, or effectual nomination, or regular appointment of Dr. Jackson.

The fact appeared to be thus—Notice was given to the parish, “to meet on the 5th of *December*, to receive the rector’s nomination.” The clause in the act was read at that meeting; which clause impowers the rector to nominate. Then his nomination (under hand and seal) was read. Eighty-nine of the principal inhabitants signed their approbation. None *dissented*, expressly: but some of the parishioners *demand a poll, on behalf of one Mr. Moore*. The churchwardens refused to take any poll; alledging that there was *no election*, and therefore could be no poll for *him* as a candidate.

THE COURT held this to be NO DISSSENT to the rector’s nomination of *Dr. Jackson*. It was an attempt to put up another for election; supposing “that they had “a right to elect;” which, in fact, they *had not*. This was a *mistake*: and this demand of a poll was all *nugatory and void*. It was no DISSSENT to the nomination of *Dr. Jackson*. If a poll had been taken, it does not appear that *Dr. Jackson’s* nomination *would have been dissented to*. If the majority were really dissentient, they should have DECLARED their *dissent*. But what was here done, was all lost and thrown away: it had no more effect, than if they had gone away without giving either assent or dissent.

Therefore there is *no* right that is worth trying: and consequently, it would answer no purpose “to put the parish to any further charges.”

Let the RULE be DISCHARGED.

POSTLETHWAITE *versus* PARKES.

Tuesday, 29th April 1766.

THIS was an action of trespass *vi et armis* for an assault upon the plaintiff’s daughter, and getting her *with child*: and the declaration concluded with a *per quod servitium amisit*.

Action for seducing a daughter per quod servitium amisit, does not lie, if she be in the service of another.

It was tried before Mr. Justice *Bathurst*; and a verdict was given for the plaintiff on the second count, and 40s. damages.

A special case was stated, to this effect—The plaintiff’s daughter, being twenty-three years of age, hired herself to one *Saul*, as a servant; and went to live with *Saul* her master, and served him some time. During her service, she was gotten with child, by the defendant; and becoming big with child, and unable thereby to perform her service as she was used and ought to do, she was discharged by *Saul* her master, who paid her her wages in proportion to the service she had already done him; and the plaintiff her father received her, when no one else would; and lodged and boarded her in his house. she was there delivered of a male bastard child, in

[See 2 Durn. 166. 5 Durn. 358. 6 Durn. 628. 5 East. 46.]

1766.

REX

v.

ST. ANNE’S
SOHO.

[1878]

1766. *November* following: and the plaintiff her father maintained her in her lying-in, at his own expence.
 POSTLE- The question which arose at the trial; and which was
 THWAITE reserved for the opinion of this court is, "whether the
 v. " plaintiff can maintain this action." (a)
 PARKES.

[1879] Mr. Davenport, for the plaintiff, endeavoured to shew that he *could*.

The first question is "whether the father and daughter can be considered as *master* and *servant*."

Second question "whether her *age* makes any difference in the case;" as she was *upwards of twenty-one; viz. twenty-three* years of age.

First—The action is maintainable by the *father*, upon the foot of being her master; as he has alledged "*per quod servitium amisit*." He agreed that no action would lie, but by reason of the loss of her service. So are the cases in 1 *Bultr.* 373. 2 *Lutw.* 1497. 1 *Ro. Rep.* 393, 394. *Cro. Eliz.* 769, 770. *Barham v. Dennis*. Sir *T. Raym.* 259, *Hunt v. Wotton*, 31 C. 2. in *Scacc'*. *Style* 398. *Norton and Jason*: which is cited in *Raymond* 260. and was an action for breaking and entering the plaintiff

(a) There are two different kinds of action that may be brought in these sort of cases, viz. 1st. An action of trespass *vi et armis* for breaking and entering the plaintiff's house, and debauching his daughter, in which case, the action is a general action of trespass, and therefore ought to be laid *vi et armis*; and the entering the house is the gist of the action, and therefore must be proved; and if that be proved, the plaintiff will be entitled to a verdict, whether the debauching his daughter be proved or not; for that, in this case, is only matter of aggravation to induce the jury to give greater damage; or 2dly, An action may be brought for debauching the plaintiff's daughter without more; but then it must not be a general action of trespass, but trespass on the case, in which the debauching the daughter is necessary to be proved; for without it in this action the plaintiff cannot have any verdict, and in strictness the plaintiff ought to prove his loss of service; and formerly some evidence, though slight, was thought necessary to be given of the daughter's doing some sort of service, but afterwards it was always sufficient to prove that she lived with her father, and that he lost her assistance, or was at some expence on account of her lying-in; and then though she was above twenty-one, and large damages were given, yet the court would not set aside the verdict; and less strictness is requisite where the daughter is under twenty-one.

Jason's house, and assaulting his daughter, and getting her with child of a bastard, *per quod servitium amisit*. Roll, Ch. J. thought that the father might have an action for the loss of her service caused by this.* So Bro. Abr. Title Trespas, pl. 442. and *Russell v. Corne*, in 2 Lord Raym. 1032. and 6 Mod. 127. S. C. prove that it is necessary to say "*per quod servitium amisit*." But *per Holt*—
 "No action lies for assaulting and getting a daughter with child: but if he that has done it, enters his house, and assaults his daughter and gets her with child, he may maintain an action for entering his house and assaulting his daughter and getting her with child, *per quod servitium amisit*." It may be added as *aggravation, inter alia enormia*. And 1 Sid. 225, *Sippora v. Bassett*, shews, in what cases damages may be given, and evidence allowed, for *alia enormia*.

Saul, the master, here sustained no damage: for he discharged her as soon as she became unserviceable to him; and paid her her wages only in proportion to her past service.

The father may justify an action for a battery brought against him by one who was assaulting his child. 1 Bacon's Abridgment, 155. Letter C. A father has an interest in all his children: he had a writ *quare filium et heredem rapuit*. He must provide for them; and ought to receive comfort from them: and if any take them from him, he ought to have a remedy for the injury.†

Here, a daughter goes out to service, within three miles of her father's house: she is gotten with child, discharged, and returned upon her father, helpless and unable, in that condition, to maintain herself. He is obliged by 43 Eliz. c. 2. to maintain her; and did so from the necessity of the thing. Therefore, from the consequential damage, an action is maintainable by the father: in whose house she resided; and where she must, in this case, be considered as a servant.

2d Point—Her being twenty-three years of age makes no difference. This young woman's master could not bring an action against this defendant: no-body but the father could sue. And the damage is the same to him whether she be over or under twenty-one.

He argued, that this case could not be considered upon the foot of emancipation; and concluded with praying judgment for the plaintiff.

Mr. Wallace, contra, for the defendant.

The foundation of actions of this kind has been the loss of service.

The father's interest in the child, whatever it might have been during infancy, ceases at the child's coming to the age of twenty-one.

1756.

POSTLE-
THWAITE
v.

PARKER.

* Roll added,
 "but it is a
 pretty case,
 and fit to be
 argued.
 Therefore
 bring us
 books: and
 we will advise
 upon it."

† V. Cro.
 Elis. 770.

[1880]

1766.
POSTLE-
THWAITE
v.
PARKES.

Many injuries may be done to a child, which are not the subjects of actions by the father.

Indeed an action will lie by a father, for *taking away* his son, or his daughter. *F. N. B.* 3d edit. pa. 260. And the father has an interest in his heir. *Radcliffe's case, Plowd.* 267. b.

But an action will not lie by the father for *debauching* his daughter. So was *Holt's* opinion, in 2 *Lord Raym.* 1032, *Russell v. Corne.*

If the father maintains the daughter in his *own house*, he is intitled to her service and may maintain an action for the loss of her service. But here, she was hired out to service in *another man's house*.

As to the father's being *obliged* to maintain her—Such an obligation can arise only from 43 *Eliz. c. 2.* But here it is not stated, either that she was *unable* to maintain herself: or that the father was *able* to maintain her.

[1881] If she had been *under age*, and *under her father's roof*, I would agree that he had been intitled to an action as for the loss of service.

[13 Vin. 1396.] *Barham v. Dennis.* in *Cro. Eliz.* 769, 770, was not determined: but three judges, (*Anderson, Watmesley, and Kingmil,*) held “that the father shall not have an action “for the taking of any of his children which is *not* his “heir.”

Cro. Eliz. 55, *Gray v. Jefferies*: “trespass for beating “the son, lieth not for the father.”

The *infancy* was the ground of the action in *Raym.* 259, *Hunt v. Wotton*: the son was an infant under the age of discretion.

They can produce *no instance, no precedent* of such an action as this is: and their *principle* will not hold; because it depends upon the *loss of service*, (which was *not* the present case.)

N. B. It appeared that the parties were *poor*.

THE COURT proposed a compromise; which was accepted; it was—“that all proceedings be stayed, without costs on either side.”

RULE, by consent, accordingly.

Lord MANSFIELD, addressing himself to Mr. *Wallace*, said to him—“it is not upon any doubt, in “point of law; that I propose this compromise:” meaning (I suppose) that he was clear *with Mr. Wallace*, “that “this action could *not* be maintained.” And on this supposition, I have ventured to report it, though it was not determined judicially and in form. However, there can be no doubt, but that the court were all of opinion “that the action could not be maintained:” and therefore, in compassion to the plaintiff, whose daughter had

been injured by the defendant, they wished to save him from the payment of costs.

1766.

ROSE

v.

ROSE, ex dimiss. VERE, et al. *versus* HILL.

HILL.

ON the trial of this cause at *Coventry* assizes, on 26th *March* 1766, it appeared that *Thomas Hill*, the father of the defendant, being seised in fee of the premises in question, upon the 9th of *July* 1754, duly made his will in such manner as by law is required for devising real estates; and thereby devised as follows; *viz.* "I will that my just debts and funeral charges and expences which I shall justly owe at the time of my decease, be, in the first place, paid by my executors hereinafter named: and as to my estate both real and personal, I dispose thereof as follows—First, I give and devise all that my messuage, &c. (being the premises in question, and the whole estate of which he was seised,) also all other my messuages, lands, tenements and hereditaments in the said city of *Coventry* or elsewhere, unto which I am in any wise intitled, unto my dear wife *Mary*, for and during the term of her natural life: and from and after her decease, I give and devise the same premises, every or any part thereof, to and to the use of *Anne, Thomas, Mary, William* and *Nathaniel* my sons and daughters, and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants; chargeable with the mortgage or incumbrance already made by me, of the same premises or some part thereof, to Mrs. *Yardley* of the said city of *Coventry*, for the sum of 100*l.* and interest, and as to, for and concerning all the rest and residue of my goods, chattels, ready money, debts and securities for money, plate, household goods, utensils in my trade or business, and all other my personal estate whatsoever and wheresoever, and of what nature, kind, or quality the same are, and not otherwise. by this my will given and disposed of, I give and bequeath the same and every part thereof unto *Anne, Thomas, Mary, William* and *Nathaniel*, my sons and daughters; and the survivors and survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common, and not as joint-tenants. And I constitute my said dear wife, my daughter *Anne*, my son *Thomas*, and my daughter *Mary*, executors of this my last will and testament."

That soon after making this will, *viz.* in *August* following, the testator died, without having revoked or altered the same, seized of the premises in question. That on

Devise by testator to his five children and the survivors and [1766] survivor of them, and the executors and administrators of such survivor, share and share alike, as tenants in common and not as joint-tenants. The words "survivors and survivor" relate to the death of the testator.

1766. his death, *Mary* his widow who survived him, entered and
ROSE enjoyed the premises during her life. And that his said
V. sons and daughters all survived him.

HILL. That his said daughter *Anne* married *Richard Bur-*
bery; and died intestate, the 19th of *November* 1759,
without issue.

That his said daughter *Mary* was never married; and
died in *September* 1764, intestate.

[1883] That *Mary*, the testator's widow died in *October* 1764 :
and his said son *William* died intestate the 20th of *Ja-*
nuary 1765 ; and was never married.

That the said *Thomas Hill*, the eldest son and heir of the
said testator *Thomas Hill*, immediately upon the decease
of his mother *Mary*, entered upon and took possession
of the said premises; and afterwards, viz. on the 9th of
February 1765, by indentures of lease and release dated
8th and 9th *February* 1765, made between himself on the
one part and the said *George Lilley* (one of the lessors
of the plaintiff) of the other part, conveyed one un-
divided moiety or full half part, undivided, of and in all
the premises in question, to and to the use of the said
George Lilley his heirs and assigns for ever; subject
to redemption on payment of 340*l.* and interest, to the
said *Lilley*, on the 9th *August* then next ensuing.

That the said *Thomas Hill*, the mortgagor died in *May*
1765; leaving the defendant *Nathaniel* (who was the
youngest child of the testator *Thomas Hill*) his brother
and heir; who, on his said brother's death, took posses-
sion, and has ever since been in possession, of all the real
estate devised by his late father as aforesaid; claiming the
whole thereof, and insisting " that under and by virtue of
" the said will, he is intitled to the whole thereof, as being
" the SURVIVOR of all his said brothers and sisters." It
also appeared, that the mortgage referred to in the testa-
tor's said will was a term for years, which has since been
satisfied, and by assignment vested in the said *James Vere*
and *Dorcas Yardley*, lessors of the plaintiff: and it was
agreed by all parties in this cause, " that the said term
" should not be set up, but be considered as surrendered
" or otherwise determined;" and " that nothing should
" be insisted on by or between the parties on either
" side, but the true construction and legal operation of the
" said testator's will, as to what estates thereby passed to
" his children respectively."

It further appeared, that the said *George Lilley* was un-
paid his said mortgage-money; and that this ejectment
was brought to recover a moiety or half part, undivided,
of and in the premises in question; to which the said
George Lilley set up a title under and by virtue of the
abovementioned indenture of lease and release: but the

defendant insisted, that by his late father's said will, he, *as surviving devisee*, had a right to *all* the said premises, on the death of his said brother *Thomas*, notwithstanding the said indentures.

By consent of the counsel on both sides, the jury in this cause gave a verdict for the plaintiff; subject to the opinion of the court of *King's Bench* upon the following question; *viz.*

"WHAT estate passed from the said *Thomas Hill*, the eldest son and heir of the said testator *Thomas Hill*, to the said *George Lilly*, by the said indentures of the 8th and 9th of *February* 1765, in any and what part of the premises in question: and whether the plaintiff is intitled to recover any and what part thereof in this ejectment."

Mr. *Wheeler*, for the plaintiff, argued that the lessor of the plaintiff was intitled to recover a moiety of the estate: for, it was either a tenancy in common, in fee, in the five children of the testator; or, it was a tenancy in common for life, and the reversion in fee remained in the testator; and three parts of that reversion in fee descended upon the lessor of the plaintiff.

Mr. *Caldecot*, contra, for the defendant, agreed, that if either of Mr. *Wheeler's* constructions would prevail, the judgment ought to be for the plaintiff. But he argued thus—*Nathaniel Hill*, the defendant, is the survivor of all the five children: and the true construction of the will is "that it was a tenancy in common amongst the five children, for life: with SURVIVORSHIP to the longer liver of them." Therefore, upon this construction, the right is in the defendant: who is intitled to the whole, as the last survivor.

Mr. *Wheeler* was stopt from replying: the court thinking the case sufficiently clear, on his side.

LORD MANSFIELD stated the case and the will; for the sake (as he declared) of the students.

After which his lordship proceeded as follows—

The question is (a) "whether the conveyance of one half, by *Thomas*, be good, or not."

An estate to more than one, with a benefit of survivorship, is a joint-tenancy. But the testator has expressly declared "that they shall not take as joint-tenants." Mr. *Caldecot's* construction is therefore too refined for the testator's meaning. He meant to dispose of all his estate real and personal: and he meant to dispose of his real estate

1766.

ROSE
v.

HILL.

[1884]

(a) *Holt* 370. 3 *P. Wms.* 472. 3 *Ves.* 206. 4 *Ves.* 553. 7 *Durn.* 638. 1 *P. Wms.* 96. 1 *Vez.* 13, 165. 2 *P. Wms.* 280. 14 *Vin.* 425. pl. 3, 486. pl. 11, 487. pl. 16.

1766.

ROSE

v.

HILL.

amongst his children, after the death of his wife. And he uses the *same* words in disposing of the *real estate*, as he does in disposing of the *personal*: and they explain each other. There are words in this will, which plainly shew that he *meant* his estate to go to the *representatives* of his children, after their deaths; though he has used improper terms.

It is plain that they were not to take as *joint-tenants*: and it is plain to me, that he considered that several of his five children might happen to die in his own life-time; and therefore makes a provision for such of them as should *survive him*, and be in existence *at the time* when the interest was to *rest*, and their representatives. He mean to prevent a lapse. And therefore we may rather apply the words to a fixed particular *time*, than give no meaning at all to them. And this is agreeable to the case of *Stringer v. Phillips*,* 18th December 1730, at the *Rolls*.

* See Eq. Ca.
Abr. Vol. 1.
p. 292. c. 11.

But, as against the defendant, it is enough to say "that it cannot come to *him* by SURVIVORSHIP."

Mr. Justice WILMOT concurred. He thought the true construction to be, that these words "survivors and" "survivor" were inserted in order to prevent the consequence of any lapse, by any of the testator's children dying in his own life-time.

He meant his children to be all *equal*; and if one only or more should survive the rest, *at the time of his death*, the clause means "that the share or shares of such survivor or survivors should go to *them* and *their representatives*:" but he could never mean to *exclude* the children of any of his children who should leave any. This will gives the *absolute* fee to *all*, as tenants in *common*: (for, "executors" is equivalent to "heirs," in a will.) But if it did not, yet the plaintiff would be intitled, as heir at law, to the *reversion*.

Mr. Justice YATES (who tried the cause) concurred.

The testator's intention is as plain as can be. He says, "his children shall take as *tenants in common*, and *not* as joint-tenants." And the words "survivors and" "survivor" shall not destroy and control this plain intention: in support of which opinion, he cited 3 *Lex.* 373. *Blisset v. Cranwell et al.* and 1 *Salk.* 226. *S. C.* And also the case of *Stringer v. Phillips*, before-mentioned by Lord Mansfield.

Lord MANSFIELD and Mr. Justice WILMOT likewise mentioned the case of *Hawes v. Hawes*, 25th September, 1747, and *Marriot v. Townley* 27th June, 1748. And a case of *Stones v. Heantley et al.* 25th November, 1748, in Chancery: which was this—*John Stones*

[1886]

having issue four children, viz. *John* his eldest son, and *Dinah* by his first wife; and the plaintiff (*Francis*) and *Mary*, by his second wife; by will, 13th April, 1723, *inter alia* directed that the remainder of his estate which he was intitled to at the death of his aunt *Mawhood*, should go to and be *equally divided amongst* his three children, *Dinah*, the plaintiff, *Francis*, and *Mary*, and the survivor of them, and their heirs for ever. Four children survived the father. *Mary*, the plaintiff's sister, died an infant, in the life-time of Mrs. *Mawhood*. *John Stones*, the son, died; leaving his sister *Dinah*, of the whole blood, his heir. *Dinah* died; leaving the defendant, her infant son. Question—"Whether the plaintiff should take, as survivor."

1766.

ROSE
v.

HILL.

Lord Chancellor went upon the case of *Blisset* and *Cranwell*; and held it to be a tenancy in common.

In the present case, THE COURT were unanimous, that it was a tenancy in common, in fee; and that the words "survivors and survivor" relate to the death of the testator.

Per Cur.—

Let the POSTEA be delivered to the PLAINTIFF.

WILLIAMS versus LEPER.

Friday, 2d April 30d
May, 1766.

ONE *Taylor*, a tenant to the plaintiff, being three quarters of a year (which amounted to 45l.) in arrear for rent, and insolvent, conveyed all his effects for the benefit of his creditors. They employed *Leper*, the defendant, as a broker, to sell the effects; and accordingly, he advertised a sale. On the morning advertised for the sale, *Williams* the landlord came to distrain the goods in the house. *Leper* having notice of the plaintiff's intention to distrain them, promised to pay the said arrear of rent, if he would desist from distraining; and he did thereupon desist.

At the trial, a verdict was found for the plaintiff, for 45l.

The question was, whether the verdict should be entered up for 45l. or for a smaller sum (7l. 5s.) the promise not having been reduced to writing. [See 7 Durn. 208. 2 East, 328.]

It was now argued by Mr. *Morton* and Mr. *Walker* for the plaintiff; and by Sir *Fletcher Norton* and Mr. *Wallace* for the defendant. • v. 29 C. 2 c. 3. § 4.

[1887]

The counsel for the plaintiff spoke to this effect.

It is objected on the part of the defendant, "that this is an undertaking or special promise for the debt of the arguments and cases that would be urged against them." [It had been debated at the trial: so that the counsel were apprized

1766. "another person, *within the statute of frauds*; and therefore ought to have been reduced into *writing*.

WILLIAMS

v.

LEPER.

Answer—

But this is *not such* a special promise for the debt of another, as is within the statute of frauds. That statute only meant to prevent *parol* promises, where there was no new consideration moving from the party making the promise to the party to whom it was made: it was not meant to prevent *direct* undertakings; but only *collateral* ones, for the debt, default or miscarriage of *others*. Whereas here was a *new* consideration: for, the goods of *Leper* were, at the time of the promise, liable to the landlord's distress.

+ V. ante,
374, 375,
376. Harris
v. Huntback.

The case of *Rothery v. Curry*, Tr. 21 G. 2. in C. B. has been urged by the defendant's counsel, as in point. But *that* was only putting him off from suing; "in consideration that the plaintiff would not sue *A. B.*" It was held to be within the statute.

2 Ld. Raym. 1085. *Buckmyr v. Darnall*—"In consideration that the plaintiff would lend two geldings to *A. B.* and *C. D.* they should return them"—was held to be collateral and within the statute. 1 Salk. 28. S. C. (but there called *Bourkmire v. Darnell*.)

Tr. 32, 33 G. 2. *C. B. Fish v. Hutchinson*, was for a debt of another: "*J. S.* being indebted to the plaintiff in 8l. 4s. the defendant promised to pay the costs, if the plaintiff would discontinue the action:" which he did. The promise, not being in writing, was holden void, by the whole court.

[1888]

But *those* were mere naked promises by persons not obliged to answer for the debt or demand, on their *own* account. The present case is a *direct* undertaking, for *himself* and *not for another*. The plaintiff had a legal interest in these goods, prior to the bill of sale; and has been deprived by the defendant of an advantage which he can never have again. The property of these goods was in *Leper*, as trustee for the creditors, at the time when he made this promise. It is an *original* undertaking.

The case of *Reid v. Nash*, Tr. 1751, 24, 25 G. 2. B. R. is in point—"In consideration that the plaintiff would withdraw his record, and not try the cause, he promised to pay 50l." That was an *original* undertaking. So in 5 Mod. 205. *Stephens v. Squire*—It was not a promise for a debt of *another* person: the defendant was *himself* originally liable. It was a promise to pay 10l. and costs of suit, in consideration "that the plaintiff would not prosecute the action."

This promise "to pay the arrears, if the plaintiff would desist from distraining," is a *new* express promise,

and not within the statute. Therefore it was not necessary that this promise should be in writing. It was not a *collateral* undertaking; but an *original* one. 1766. WILLIAMS

The counsel for the defendant insisted, that upon *this* declaration, coupled with the facts given in evidence, the plaintiff had no right to recover this 45l. For, the declaration expressly charges "that *Taylor was indebted to the plaintiff* in 45l. for three quarters of a year's rent; and "that the defendant *undertook to pay it*:" which is directly within the words of the statute of frauds "a special promise to answer for the debt of another person."

V.
LEPER.

LEPER was in possession of the goods of the tenant, who owed the plaintiff three quarters rent: and about to sell them. The landlord comes to distrain for this three quarters of a year's rent. *Leper* promises to pay it, "if he will desist from distraining." He promises *absolutely*—"to pay it:" not "to pay it out of the goods sold," or under any other restriction.

A forbearance to sue, is a good consideration for an *assumpsit*.

Before the statute of frauds, *all* promises were binding; whether *original* or *collateral*. But that statute says, "that where one promises for the debt, default or miscarriage of *another*, the promise must be in writing." V. sect. 4.

The case of *Fish v. Hutchinson*, and *Reid v. Nash*, are both upon the same principle: both were *collateral* promises. The second promise did not extinguish the original debt: it did not extinguish the action. Therefore both were liable for the same debt. The original debtor remained liable: and therefore the promise was *collateral*, and consequently within the act. Indeed, if [1889] the original debtor is discharged, then it is an *original* [S. C. Bull. promise and not *collateral*: which was the case of *Reid v. Nash*: that was an action of trespass for assault and battery brought by *Reid* against *Johnson*: and the defendant promised "that if the plaintiff would withdraw his record, he would pay 50l. &c." It was an original tort. Therefore that case was not contrary to *Fish v. Hutchinson*; but determined upon the *same* principle.

The plaintiff cannot recover upon *this* declaration: it is upon a promise "to pay the debt to which *Taylor* was before liable:" and *Taylor* still remains liable, till actual satisfaction. Therefore this is a *collateral* promise: and both are liable. Consequently, it is within the act.

If indeed the declaration had averred "that *Leper* promised to pay it out of the produce of the goods when sold; and that in consideration of that promise, he had desisted from distraining;—that had been a different case.

1766.
WILLIAMS
v.
LEPER.

Lord MANSFIELD—The evidence went further than the declaration states. The declaration does not state whether the promise was in writing, or not: the evidence shews it was *not*. But both are consistent.

This case has nothing to do with the statute of frauds.

The *res gesta* would intitle the plaintiff to his action against the defendant.

The landlord had a legal pledge. He enters, to distrain: he has the pledge in his custody. The defendant agrees "that the goods shall be sold, and the plaintiff "paid in the first place." The goods are the *fund*: the question is not between *Taylor* and the plaintiff. The plaintiff had a *lien* upon the goods. *Leper* was a trustee for all the creditors: and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the statute of frauds. It is rather a fraud in the defendant, to detain the 45l. from the plaintiff, who had an original lien upon the goods.

Mr. Justice WILMOT thought this case out of the statute of frauds. This is not a collateral promise to pay the debt of another.

[Bull. 281.]

[1890]

The case of *Reid v. Nash* does not clash with the other determinations on the statute of frauds. That was an *original* undertaking; the debtor was never liable for that particular sum of 50l.

But *this* case is not within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The defendant made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is *in possession* of the goods; having entered with intent to distrain them. *Leper* was the agent for the creditors. He makes this promise, in order to *discharge the goods* of this distress. I consider this distress as being actually made. *Leper* says, "if "you will quit the goods and *disincumber the fund*, I "will pay you."

Leper became the *bailiff* of the landlord: and when he had sold the goods, the money was the landlord's (as far as 45l.) in his *own bailiff's* hands. Therefore an action would have lain against *Leper*, for money had and received to the plaintiff's use.

Mr. Justice YATES—It was not necessary to state in the declaration, "that the promise was in writing."

This declaration states a promise "to pay the arrear "of rent *amounting to 45l.*" (a specific sum.) The defendant was in possession of the goods, and about to sell them. The plaintiff entered, with intent to distrain them for 45l. The defendant says—"Let me go on to sell

2nd ed. see 20th
308.

"them: and I will pay you the 45l." He undertook to pay this, in all events, peremptorily and absolutely. This is an original consideration to the defendant. Therefore he concurred in being opinion for the plaintiff: and that the verdict should be entered for the sum of 45l.

1766.

WILLIAMS
V.

LEPER.

Mr. Justice ASTON—If this was a promise to pay the debt of *Taylor*, I should think it within the statute, upon Sir *Fletcher Norton's* distinctions; which are the true ones.

But I look upon the goods here to be the debtor; and I think that *Leper* was not bound to pay the landlord more than the goods sold for, in case they had not sold for 45l.

The goods were a fund between both: and on that foot, I concur.

But otherwise, I should have thought (with Sir *Fletcher*) [1891]
"that the case of *Reid v. Nash* does not clash with the
"other determinations about collateral promises."

POSTEA to be delivered to the PLAINTIFF:
and the verdict to stand for the whole 45l.

BUTTER versus HEATHBY.

THIS was an action upon the case against the defendant, for not fetching away his tithes in a reasonable time.*

The declaration states, that the plaintiff set out the tithes; and the defendant refused to fetch them away.

At the trial, the defendant's counsel insisted on a custom in the parish, "that notice should be given to the owner of the tithes, of the setting them out."

The proof of the custom was not entered into, at the trial: but the validity of the custom was discussed.

Mr. Justice Gould, who tried the cause, held the custom not to be a good one: and a verdict was found for the plaintiff, and thirty guineas damages; subject to the opinion of this court upon the following

Question—"Whether this custom be good in law, or not."

A motion had been made for a new trial; and a rule to shew cause. It was argued on Thursday last, by Mr. Serjeant Burland, Mr. Thurlow, and Mr. Mansfield, on behalf of the plaintiff (the occupier;) and by Mr. Serjeant Davy and Mr. Dunning, for the defendant (the impropriator.)

The counsel for the plaintiff denied this to be a good custom; 1st. Because it was only setting up the ecclesiastical law, against the common law of the kingdom: 2dly.

Tuesday 6th
May 1766.

Notice of setting out tithes must be given by the occupier to the owner.

* Note. It must be case: trespass vi et armis will not lie; because it is only a non-seizance, not a mal-seizance. V. Latch. 8.

Stilman v. Chanor; and 1 Lord Raym. 188. Shapcott v. Mugford. [See Vin. 582.]

1766. This can not be done by custom in any *particular district*.

BUTTER

V.

HEATHBY.

The farmer is *not* bound by *common* law, to give previous notice of the *time of his setting out* tithes.

* V. Noy 19.
Spencer's case,
and 2 Ventr.
43. accord.

Mr. Justice WILMOT—By the *common* law, no notice is necessary: * by the *ecclesiastical* law, it is necessary. The question therefore is, "whether the *ecclesiastical* law can be *introduced*, under the notion of such a custom."

THIS was agreed to be the question.

The plaintiff's counsel objected, that this custom is *not* a reasonable or good one; because it is not founded upon any *consideration*. And admitting the *canon* law to be as has been mentioned, yet it can not be set up against the *common* law of the kingdom: at least, it ought to have been *pleaded*. It can be no bar to this action, or to the form of it. For, it is not alledged "that these tithes were *not fairly and honestly* set out:" and *if* they were fairly and honestly set out, they ought to have been taken away by the impropriator.

The farmer can receive no benefit by giving such notice: on the contrary, he may be much incommoded by being bound down to set them out the particular time notified. For he can not carry *any* away, till he has set out the *whole*: and a *lay-impropriator* may reside out of the parish, and at a very great distance; or the farmer may not know *to whom* notice is to be given, or *where*; or have *time* sufficient to admit of giving such previous notice of setting them out.

[Bunb. 333.]

Indeed notice to the owner of the tithes, "of their *HAVING been* set out," is previously necessary to the bringing an * action for not carrying them away. And *this* notice was given.

* 2 Ventr. 48.
accord. and
1 Ro. Abr.
643. Title
"Dismes,"
letter X. pl. 1.
and Bacon's
Abr. Vol. 5.
p. 106.

But the defendant insists that there ought to have been previous notice "of setting them out."

Bequer v. Spratley, in *Bunbury* 333, is the only case to be met with on such custom as this: and that case was never determined. Two judges against one, seemed to think "that it was *bad*."

The counsel for the defendant, who argued in support of the rule for a new trial, admitted "that the *common* law "does not require the notice of setting them out:" but this custom *does* require it; and they insisted that it is a *good* custom.

This custom falsifies the demand made by the declaration. For, the declaration alledges, "that the parishioner "has been always used to set out the tithes so and so; [1893] "and that *he set them out in due manner*; and the defendant neglected to take them away." The defendant shews this custom; and that, for want of pursuing it,

these tithes were *not* in *due manner* set out. And if they were not set out in *due manner*, then he was under no obligation to take them away.

It is part of the definition of a custom, "that it *differs* from the common law." We do not say, "it is good, because it is agreeable to the canon law:" we only say, "it is good, as being the *lex loci*." "It is the law of the land, here in this parish."

The *consideration* of customs cannot be inquired into: however, if it were necessary to do so, *honesty* and *piety* are sufficient considerations for this custom. But customs must be *presumed* to have sprung from *good* considerations.

This custom prevails in half the parishes in the west of *England*: and as tithes depend, in a great measure upon custom, so also does the manner of setting them out.

The parson can not set them out *himself*: but by 2 Ed. 6. c. 13. § 2. he may come upon the land, and *see* it done. And this statute directs tithes to be set out according to the customs of the respective parishes.

The custom does not *require* the parson to be present; nor does it fix the tenant to reap his corn in bad weather: it is only a check against injustice being done to the parson. A *reasonable* notice is all that is requisite. If the custom should be abused, the tenant would be restrained from making an ill use of it.

From † *Hutton's* opinion to Lord Ch. J. *Lee's* time, and by *Godolphin* expressly, such previous notice of setting out, is necessary by the *ecclesiastical* law.

The case in *Bunbury* is an instance in support of the custom. There, indeed, ‡ *personal* notice was insisted on. But we do not require *personal* notice: we say—"to him-
self, agent, or servant." And it is his own fault, if he leaves the parish, and leaves no agent.

appear. though there is enough to justify this observation, upon the strict words of the report.

In the cause at *nisi prius*, *Tannard v. Yarborough*,* at * Mr. Wheeler *Lincoln* assizes, Lord Cn. J. *Willes* held such a custom to be good; and said, he wished it was the law of the land. this from his memory.

And it must be understood (in the present case) that [1894] this custom could have been proved.

Lord MANSFIELD said it had been very well argued. It depends upon general reasoning, and the case at *Lincoln*: for that in *Bunbury* does not ascertain any

1766.

BUTTER

V.

HEATHBY.

+ See Noy 19. Spencer's case: "it was said by Hutton that by the civil law, &c."

‡ That does not perhaps, quite clearly

1766. thing; it went off upon another point.* We will think of it.

BUTTER

V.

HEATHBY.

* It did so. And with regard to this point it is only said "that Barons Carter and Comyns thought there was something in the objection; though the lord chief baron thought it well enough."

Mr. Justice WILMOT observed, that the canon law is no otherwise an argument in the present question, than as it may serve to shew that the custom has not been thought unreasonable. (a)

Curia advisare vult.

Lord MANSFIELD now delivered the opinion of the court.

The only question is "whether this be a *reasonable custom* or not."

There is no *authority* that comes up to this point, but one: and that was a cause on the *midland* circuit before Lord Ch. J. *Willes*; who thought it a *reasonable custom*. I think so too.

I believe the doubt about it arose from a jealousy of receiving the ecclesiastical law in any case whatsoever; lest the clergy should introduce it by degrees. (b)

It is reasonable, as *promotive of justice*, and *preventive of fraud*.

Mr. *Dunning* said, as of his own knowledge, "that there were such customs in the *west of England*;" and I am told there are such in *Lincolnshire* likewise.

We are all clear "that it is a *good custom*." It is for the *prevention of fraud*, and for the *convenience of the parties*.

Therefore the rule must be made absolute, for a new trial; but *without costs*.

(a) There never was till of modern times any doubt about it; and it does not appear from any former printed book that there is any such custom.

(b) It seems that constitutional jealousy against the canon law is at an end, for *Wilmot J.* above observed, that the canon law may shew that a custom has not been thought unreasonable; and according to Lord *Mansfield's* opinion, very slight evidence would be sufficient to prove a custom, for the canon law, in this particular instance, to prevail against the common law, in a matter where it is convenient for ecclesiastics, and not for both parties, and seems to make it a matter of no great difficulty for the ecclesiastics to introduce such a custom in any parish in the kingdom, and by degrees to drive the common law out of the kingdom.

And I think it is such a custom that a very slight evidence would be sufficient to prove. (c)

RULE MADE ABSOLUTE.

1766.

BUTTER
v.

HEATHBY.

OATES ex dimiss. WIGFALL versus BRYDON et al.

THIS was an action of trespass and ejectment of messuages, &c. in *Sheffield*. Not guilty pleaded. General issue joined. The cause was tried at the preceding assizes for *Yorkshire*, before Mr. Justice *Bathurst*; and upon the trial, it appeared in evidence, that *Grace Green* widow being seised in fee of some messuages, &c. and intending to intermarry with *Samuel Wigfall*, conveyed the same to trustees, to her own use for life; and after her decease, to such uses, &c. as she should either before the said marriage, or during her coverture, by her last will or otherwise, limit or appoint; and for want of such disposition, then to the use of the said *Samuel Wigfall* for life; and then to the use of her own right heirs.

The reason of
confessing
lease, entry
and ouster.

The marriage took effect: and she did afterwards, in the lifetime of her husband, duly make her will; wherein, after divers pecuniary legacies, &c. (some of which legacies are to the three children of *Thomas Brownhill*; and others, to the four children of *Samuel Water*;) is the following devise—"I give to *Samuel Wigfall*, my dear " and loving husband, the house where we now dwell, together with the stable and all other appurtenances thereunto belonging, for and during the term of his natural life; and after his decease, I give the said house " and stable with all appurtenances unto the said *Samuel Warbleton* my brother, if then alive, for and during " the term of his natural life; and after his decease, I " give the said house and stable with the appurtenances, " unto the said children of my cousins *Thomas Brownhill* " and *Samuel Water*, or such of them as shall be then " living, share and share alike. And if it happen that the " said *Samuel Warbleton* be not living at the decease of the " said *Samuel Wigfall*, then my mind and will is, that " the said house and stable with the appurtenances be

[See 7 Durn.
698.
1 Brown, 475.
Cowp. 659.]

(c) There ought certainly to be such evidence as would be sufficient to induce a belief of the fact to be proved in this and in every other case where the law requires any proof at all; and as civility very often is a reason for giving such notice, as observed by *Lee J.* in *Hewe v. White*, MS. cases, that is a reason for not allowing slight evidence in this case, even if it were in general to be allowed; and see *Comyns*, 510. *Cowp.* 807, 808.

1766.
OATES
ex dimiss.
WIGFALL,
v.
BRYDON,
et al.

"DIVIDED AMONGST the said children of my cousins
"Thomas Brownhill and Samuel Water, as aforesaid. And
"also all the rest of my estate which is not herein or
"hereby before by me given or disposed of, I do give unto
"the said Samuel Wigfall my husband." And she ap-
pointed her said husband, and brother Warbleton, execu-
tors.

[1896] The testatrix soon afterwards died : and her husband
survived her, and held the estate until his death, which
happened in August 1757. At the time of his death, and
at the time of the death of the said Samuel Warbleton
(who survived the testatrix, but died before her said hus-
band,) four of the said children of Thomas Brownhill and
Samuel Water, were living : one of whom is still living :

the other three died before the time of the demise laid in
the declaration.
The premises devised to the children, at the time of
making the will were, and still are worth 100l. to be
sold, and no more : and the testatrix had no real or
personal estate, except what is particularly mentioned in
the will.

The defendant Brydon purchased the estate in ques-
tion, of the children : the other defendants are tenants of
the same, under him. No ACTUAL ouster was proved,
previous to the bringing the ejectment. The lessor of the
plaintiff is *heir at law* to Samuel Wigfall, the husband of
the testatrix.

A verdict was given for the plaintiff, subject to the
opinion of this court on the following

Question—"Whether the lessor of the plaintiff be in-
titled to three undivided fourth parts of the premises ;
and can recover the same in this action."

It was argued on Thursday last by Mr. Fearnley for
the plaintiff, and Mr. Wallace for the defendant.

Mr. Fearnley argued that the devise to the seven chil-
dren was *only during their lives*.

Mr. Wallace insisted, that the seven children took an
estate *in fee*, as tenants in common. And he also insist-
ed, that the rule to *confess* lease, entry and ouster *does not*
supply the want of evidence of the *actual* ouster of the
tenant in common.

Mr. Fearnley replied, that they took only an estate for
life. (See 1 Ro. Abr. 834. *Fawcett's case*. Cro. Eliz.
52. *Pettywood v. Cooke* ; and *Skinner* 339. *Middleton*
v. Swain.)

And as to the objection to the entering into the rule
to confess lease, entry and ouster—He acknowledged a
dictum mentioned in 7 Mod. 33. where it is reported to
be said *per Holt*—"In case of tenants in common, there
must be an *actual* ouster of one by the other : or else,

"he shall not be *compelled to confess* lease, entry and ouster."

1766.

But here the defendants *did* confess lease, entry and ouster there, it is only said, "that he shall not be *compelled to do it*."

OATES
ex dimiss.
WIGFALL,
v.
BRYDON,
et al.

He cited 2 *Ld Raym.* 750. *Little v. Heaton*, and 1 *Salk.* 259. *S. C.* to shew that it is settled, "that proof of actual entry and ouster is *not* necessary in ejectment brought on breach of a condition of re-entry." And so is 1 *Ventr.* 248. Anonymous. He likewise mentioned 1 *Siderf.* 223. *Langhorne v. Merry*: where the court held, "that an entry shall be *intended*, till the contrary be proved." (a) (And *V. 2. Ventr.* 332. Anon.)

THE COURT having taken a few days to look into the cases—

Lord MANSFIELD now delivered their opinion.

After stating the case particularly, and the question, "whether an *actual* entry was necessary to have been *proved*; or whether the *confession* of lease, entry and ouster be *sufficient*, without actual proof of it;" he observed that as there was *no proof* of *actual* ouster, *no actual* ouster could be *supposed*: but that slight proof would be *sufficient* to be left to the jury.

However, though *no actual* ouster can be *supposed*, yet

We are all of opinion that the *CONFESSION of lease*, [3 Wils. 121.] *entry and ouster*, is sufficient to *bar a nonsuit* for want of proof of actual ouster.

We are glad to have it *settled*; because there have been different opinions.

The meaning of confessing lease, entry and ouster is, [1 Anst. 89, 92.] to bring the matter to the mere question of the plaintiff's possessory title.

In the case of *Dormer v. Fortescue*,* an actual entry *H. 11. G. 2. was holden necessary on the † *statute*: for that the word B. R. and "action," in that statute, could not mean "*ejectment*." afterwards in Dom. Proc. That was settled and established by many cases. [Andr. 136, 137.] Therefore, to *avoid a fine*, there must be an actual entry; and the demise can not be carried back beyond the actual entry. † 21 Jac. 1. c. 16.

In all *other* cases, the confession of lease, entry and ouster is sufficient. And so it is now settled that it is sufficient for an ejectment brought upon a *condition broken*. [Vide the distinction, Doug. 467.]

As to this particular case of a tenant in common—

(a) *Qu. tamen* 4 G. 2. c. 28. which was made on a contrary supposition, and dispenses with the necessity of the lord's re-entry only in the particular case there mentioned.

1766.
OATES
ex dimiss.
WIGFALL
v.
BRYDON,
et al.'

There are cases enow, to justify our opinion. He repeated the case of *Johnson v. Allen*, 13 W. 3. reported in 12 Mod. 657. And indeed it is scarce possible, he said, that a tenant in common should bring an ejectment, but where there is an actual ouster. 7 Mod. 39. 1 *Queen Anne*,---“ *Per Holt*---he shall not be compelled when he “ does *not* dispute the title: but where he *does* dispute “ it, he shall be compelled to confess lease, entry and “ ouster.”

[1898]
[Salk. 235.]

Therefore we are all clear that the confession of lease, entry and ouster is sufficient, in the case of a tenant in common, *without* proof of *actual* ouster.

Second point. As to the construction of the will---

The question is, “ whether this house and stable were “ given to the seven children, only during their *lives*; or, “ as *tenants in common*.” (b)

The whole value is only 100l.

There must be something (c) by way of *limitation*, to shew the *intention* of the testatrix: otherwise it is for *life only*.

But few ordinary people make the distinction between *land*, and *personal* property.

As this rule of law often operates against the intention of the testator, it shall be construed to carry a fee, (d) where there are words of limitation, and the testator's intention appears.

This is a *house and stable*. They are given to the husband for *life*, *expressly*: so they are to the brother. If she had *meant* the like to the children, she would have *done* the like. But she gives to the seven children, *after* the two lives, a *wasting* property, *share and share alike*. Besides, she directs the house and stable to be *divided* amongst the seven children, in case her brother dies before her husband: that is, they must be *sold*, and the produce divided.

We are of opinion, that, upon the *whole* of this will, there is enough to shew that the testatrix *intended* the *value* of this house and stable to be divided amongst the seven children.

(b) This is put wrong, for there is not a colour of doubt as to their not being tenants in common; the words *share and share alike* leave no room for doubt, the only doubt in the case was whether they were tenants for life, or in fee.

(c) Qu. If it should *not* be something to *shew* by way, &c. 2 *Vez.* 49, 50.

(d) Qu. if it should not be “though there are no words “ of limitation, if the testator's intention appears.”

The sweeping residuary clause^(e) does not alter the case: she does not dispose of all the money that she had to dispose of. 1766.

PLAINTIFF to be NONSUITED: and the
POSTEA to be delivered to the DEFENDANT.

ARMSTRONG, ex dimiss. TINKER et al.' *versus* PEIRSE,
et al.'

THIS was an action of trespass and ejectment of a messuage and lands at *Bishop's Canning* in *Wilts*; on the several demises of *John Tinker*, *Joseph Tinker*, *Benjamin Harring*, and *James Bartlet*; *Robert Prenton* and *Thomas Hunt*; and *Hester Pitman*. The cause came on to be tried at the Lent assizes for the county of *Wilts* before Mr. Justice *Aston*: when a general verdict was found for the plaintiff, subject to the opinion of this court upon the following

Trustees not to dispute the possession of their cestui que trust.

[1899]

Case—*Alice Rudman*, spinster, being legally possessed of the premises in question, for the residue of a term of 99 years, determinable upon the death of herself and two other persons; and a marriage being intended between her and *John Peirse*, yeoman: by indenture dated 21st December 1733, between the said *John* of the first part, the said *Alice* on the second part, and *Robert Tinker* and *William Harring* of the third part, the said *Alice Rudman* assigned to the said *Robert Tinker* and *William Harring* all the premises in question for the remainder of the said term of 99 years, determinable as aforesaid; upon trust for the said *Alice Rudman* and her assigns until the said intended marriage should be had: and from and immediately after, upon trust that they the said *Robert Tinker* and *William Harring* and the survivor of them his executors or administrators should permit and suffer the said *John Peirse* and his assigns to hold and enjoy the premises, and to take the rents and profits thereof during so long of the residue of the said term as the said *John Peirse* and *Alice Rudman* should jointly live; and if the said *Alice Rudman* should survive the said *John Peirse*, then after his death, in trust wholly for the said *Alice Rudman* her executors, administrators and assigns, to her and their own use and benefit: and if the

(e) Qu. For it is stated in page 1896 (line 5, 6) that the testatrix had no real estate except what is particularly mentioned in the will; for the words "all the rest of my estate, &c." in the residuary clause are applicable to the real estate as well as the personal estate, she having disposed of part of both.

1766.
ARM-
STRONG
ex dimiss.
TINKER,
et al.
v.
PEIRSE
et al.

said *A. R.* should die in the life-time of the said *J. P.* then from and immediately after such her death, upon trust to permit and suffer such persons to hold and enjoy the same premises for the residue of the term, as she by any writing under her hand and seal, &c. or by her last will and testament, &c. should appoint.

The said marriage took effect.

The said *William Harring* died in 1733.

By indenture dated 25th September 1743, (which recited the former deed of settlement, and the trusts and limitations contained in it,) in consideration of the sum of 330l. paid to the said *John Peirse* and *Alice* his wife, the said *Robert Tinker* by the direction of *Peirse* and his wife, and also the said *John Peirse* and the said *Alice Peirse* assigned, and the said *Alice*, in pursuance of her power reserved to her, limited the premises in question, to *Andrew Sealy* his executors, administrators and assigns, for the remainder of the said term of 99 years determinable as aforesaid with a proviso for redemption upon payment of the principal and interest upon the 25th of March then next ensuing. In this indenture is a covenant for further assuring the premises upon non-payment, &c.

[1900]

By indenture dated 18th November 1751, the said *John Peirse* and his wife, in consideration of 300l. assigned over the premises in question to *Hester Pitman* her executors, administrators and assigns for the remainder of the term determinable as aforesaid : with a like proviso for redemption, and covenant for further assurance as are above-mentioned.

The said *John Peirse* paid all the interest due on the said several mortgages, to the last day of payment respectively before his death, which happened in 1758. His wife survived him, but paid no interest after his death, either to *Sealy* or *Pitman*, or to any other person on their behalf: nor was any interest ever demanded of her.

The said *Andrew Sealy* and *Robert Tinker* are since dead; and the six first-named of the lessors of the plaintiff are, respectively, their legal representatives: viz. *John* and *Joseph Tinker*, *B. Harring*, and *James Barthatt*, are executors and legal representatives of *Robert Tinker*: and *Robert Preston* and *Thomas Hunt* are the executors and legal representatives of *Andrew Sealy*.

The said *Alice Peirse* continued in possession of the premises until her death, which happened in 1765; and, previous thereto, made her will dated 29th July 1759, whereby she devised the premises to the defendant her daughter in the following words—"I give unto my daughter *Alice Peirse* all that leasehold estate common-

“ly called *Reise's* which I now hold by virtue of a settlement made before marriage with my late husband.”

The defendant *Peirse* is in possession of part of the premises in question: and the other defendants, of the residue, as her under-tenants.

The question submitted to the court was “whether the plaintiff was intitled to recover the premises in this ejectment.”

Mr. *Gould* argued this case for the plaintiff: Mr. *Thurlow* for the defendants.

And the question they meant to make, was “whether a mere trustee could dispute the possession of his own *cestuy qui trust*.”

But THE COURT, though they looked upon it as a settled point, “that the formal title of a trustee should not, in an ejectment, be set up *against the cestuy qui trust*: because, from the nature of the two rights, the *cestuy qui trust* is to have the possession;” yet in this case, that was *not the question*: for, here, the lessors of the plaintiff were not trustees for the defendant, but for the mortgagees.

And therefore they immediately gave judgment; and directed that the

POSTEA should be delivered to the PLAINTIFF.(a)

REX versus LOOKUP.

Wednes. 7th
May, 1766.

ON the 30th of June 1762, in the second year of his present majesty, a bill was found against the defendant *George Lookup*, for wilful and corrupt perjury in his answers to a bill in Chancery filed by Sir *Thomas Frederick*, relative to money charged to be unfairly won by the defendant at play.

Upon this indictment, he was tried, and convicted.

He thereupon petitioned the king; and obtained a re-

An offence charged in the indictment to have been done in the time of a late king, and laying it against the peace of the present is fatal.

(a) This case was not worthy of a report, if it was determined, for the reason given by the reporter, viz. that “the lessors of the plaintiff were trustees not for the defendant but for a third person.” *Sed Qu.* if the mortgages were not both void, being made by a husband and wife possessed only in right of the wife, and the power for the wife to appoint being conditional only, in case the husband should survive the wife, and the trust of the estate (which was a term) being if she should survive her intended husband then for her, seems not assignable during the coverture being not only not vested but impossible to vest during the coverture.

1766.
ARM-
STRONG
ex dimiss.
TINKER
et al'.
v.
PEIRSE
et al'.

[1901]

1766.
 REX
 V.
 LOOKUP.

ference to Lord *Mansfield*; who chose to take the opinion of the judges. They received his affidavits, and examined into his reasons and insinuations. After which, they declared themselves thoroughly satisfied with the verdict; and saw no foundation for granting a new trial. Whereupon, they proceeded to his sentence: which was—"That he should be set in and upon the pillory, " at *Charing-cross*, for an hour, between the hours of " twelve and two; and that he should be afterwards " transported to some of his majesty's colonies or plantations in *America*, for the space of seven years; and " be now remanded to the custody of the marshal, to " be by him kept in safe custody, in execution of the " judgment aforesaid, and *until* he shall be transported as " aforesaid."

[1902]

On *Wednesday* 27th *November* 1765, (which was eight or nine days after the sentence had been pronounced,) he moved " to *stay the entry* of the judgment;" in order to give him an opportunity of moving in *arrest* of judgment; a *fatal mistake* having been *since* discovered; viz. " that the fact was charged to have been committed in " the time of the *late* king," whereas the indictment concludes " against the peace of the *present* king;" and his counsel urged, that he was *within time*; as the motion was made during the *same* term in which the sentence was pronounced, and the entry-roll of the record not yet made up.

BUT THE COURT denied this motion. They thought, that in *such* a case, and upon *such* an objection, they were not bound or warranted to let in a motion in arrest of judgment, after sentence is pronounced.

His regular remedy was by writ of error.

The next day, the defendant's counsel moved to *adjourn* his standing in the pillory, on an affidavit (made by his physician) of his *illness*; and that his standing in the pillory in the open air, for an hour, would probably *endanger his life*.

Note—The rule is drawn up, " that the marshal deliver " the defendant to the sheriff; and that the sheriff do " set him in and upon the pillory, for an hour, between " the hours of ten and twelve, on [leaving the day in " *blank* ;] and then deliver him to the marshal, &c." and this blank is afterwards filled up, at the choice and nomination of the *sheriff*. In the *present* case, it had been filled up with the words. " *Saturday* next, the 30th instant;" and had been actually *delivered out* to the sheriff.

LORD MANSFIELD—Let the rule be altered thus—" That upon reading the former rule, and upon " reading the affidavit of Dr. *Watson* concerning the

" present indisposition of the defendant, the time appointed by the said rule for setting the defendant in and upon the pillory is *enlarged*; and that the said sentence be executed *on the 17th day of December* next, or *as soon afterwards* as the same can be done *without danger* from the defendant's indisposition."

1766.

REX
V.

LOOKUP.

The next day (the last day of *Michaelmas* Term 1765,)

Eyre, recorder of *London*, on behalf of the defendant, urged the court (as he had before done, on the preceding day,) to *reconsider* their judgment, that is to say, their sentence: and he mentioned 1 *Salk* 78. *The Queen* against *Darby*, and *Farresley* (7 *Mod.*) 100. S. C. and 2 *Hale's Hist. P. C.* 379. where Lord, Ch. J. *Hale* says, "if, by any mistake or oversight, the court should give judgment against a clerk convicted of a felony within clergy; yet they may, and (as I think) *ought* to allow him his clergy, *after* his attainder." From whence he argued, that as in the present case the judgment ought to have been "*quod cusetur*" it is not only in their power to set it right now, but they are even bound *ex officio* to do so. And he said, there was no distinction, in *criminal* cases, between *form* and *substance*.

[1903]

BUT THE COURT persisted in not doing this, without some *precedent*. They said, the citation from *Hale's H. P. C.* was not parallel to the present case. There, the judgment would only be *corrected*: this is a motion to *arrest* it. That was a *capital* case too; here, you are limited to a time. And even in capital cases, you have no instance of such a motion as this, *after* the expiration of the limited time.

MOTION DENIED.

Whereupon, Mr. *Lookup* brought a writ of error returnable in parliament, and assigned several errors. 1st. That the indictment is insufficient. 2d. That the offence in the indictment specified is *not* charged to have been done against the peace of his *late* majesty; in whose reign it was alledged to have been committed. 3d. That the offence is charged to have been done against the peace of his *present* majesty; in whose reign it appears *not* to have been committed. 4th. That *no certain day or time* is fixed, appointed or limited by the judgment, for setting the plaintiff in error in and upon the *pillory*. 5th. That *no certain time* is fixed, appointed or limited by the judgment, for the *transportation* of the plaintiff in error. 6th. That the court of *King's Bench* had not any power or authority, by law, to adjudge or order that the plaintiff should be transported to some of his majesty's *colonies* or plantations in *America* for the space of seven years. * V. 2 G. 2. c. 25.

All the objections were considered as frivolous; ex-

1904

Easter Term, 6 Geo. 3.

1766.
REX
v.
LOOKUP.

cept that which was discovered after sentence pronounced. But

On 5th May 1766, the following question was put, by the Lords, to the judges—

“Whether the perjury being alledged in the indictment to have been committed in the time of the *late king*, and charged to be against the peace of the *now king*, is *fatal*, and renders the indictment *insufficient*.”

The Lord Chief Baron delivered the unanimous opinion of the judges, in the *affirmative*.

[1904]

And upon *this point*, the judgment of the *King's Bench* WAS REVERSED.

Two days after, on 7th May 1766, Mr. Recorder moved on his behalf, (but without his being brought up into court,) that he might be *discharged*.

And, the order of reversal being produced and read,

THE COURT ordered him to be

* V. post 29th
January, 1771.

DISCHARGED.*

It is very remarkable, that from *Michaelmas Term* 1756, to the time of this publication (*Michaelmas Term* 1771,) this is the only judgment of the court of *King's Bench*, which has been reversed; though, from the importance and difficulty of the questions, there have been many writs of error in the Exchequer-chamber and in Parliament.

Friday, 9th
May, 1766.

REX versus HELLING et al.

Order made on
Easter Wednesday for appointing overseers good.

MR. Core and Mr. Dunning shewed cause against quashing an order made upon *Easter Wednesday* 1766, by two justices (*Luke Robinson* and *Joseph Girdler*, Esqrs.) appointed the defendants overseers of the poor of *St. Andrews Holborn* above the bars, and *St. George the Martyr*.

It has been objected, that this is not an appointment under the statute of 43 *Eliz. c. 2.* being “for *this present year* 1766.”

Answer—But this is the usual form in this parish. And the order says, “and to do *all* such things as their duty requires;” that is, (amongst other things) to stay in their office till others are appointed.

Sir *Fletcher Norton* and Mr. *Walker*, *contra*, argued for quashing the order.

They admitted, they could not go out of the order. But by 43 *Eliz. c. 2. sect. 1.* the overseers are to be nominated *yearly*, and this act giving a *jurisdiction*, they are obliged to conform *exactly* to it. Consequently, they can nominate only FOR A YEAR; (neither more nor less.)

Whereas this appointment being made on *Easter*

Wednesday, and appointing them for the year 1766, they were not obliged nor authorized or intitled to continue any longer than the *end of the year 1766*. It is not an appointment for a year.

1766.
CARTER
v.
BOEHM.

LORD MANSFIELD—The *real* objections, I take it for granted, are not before the court.

The only question *before us* is “whether the order is “good upon the *face of it* or not.”

Now this order plainly means the *overseer's* year : and *that* year is from *Easter 1765*, to *Easter 1766*. You would make it bad, by understanding it to mean the year of our Lord. But you can not construe this order to be a bad one, by understanding it so : for it manifestly means *quite another sort of year*.

Mr. Justice WILMOT was silent, being a parishioner.

Mr. Justice YATES was absent.

Mr. Justice ASTON concurred with Lord Mansfield ; and said, that if the construction may be taken two ways : one of them making the order good, the other making it bad ; he should take it in the sense that would make it *good*. Wherefore

Per Cur.—

RULE DISCHARGED.

ORDER AFFIRMED.

REX *versus* INHABITANTS OF ECCLESALL BIERLOW in Monday 11th
SHEFFIELD. May, 1766.

See this case ABRIDGED, in the table ; and *at large* in the quarto-edition of my SETTLEMENT-CASES, No. 180. Pa. 562.

CARTER *versus* BOEHM.

[R. C. 1 B1.
593.]

THIS was an assurance-cause, upon a policy under-written by Mr. *Charles Boehm*, of interest, or no interest : without benefit of salvage. The insurance was made by the plaintiff, for the benefit of his brother, governor *George Carter*. Concealment will avoid a policy of assurance.

It was tried before Lord Mansfield at *Guildhall* : and a verdict was found for the plaintiff by a special jury of merchants. [1906]

On *Saturday* the 19th of *April* last, Mr. Recorder (*Eyre*,) on behalf of the defendant, moved for a new trial.

His objection was, “that circumstances were not sufficiently disclosed.”

A rule was made to shew cause : and copies of letters [4 East. 596.] and depositions were ordered to be left with Lord Mansfield.

N. B. Four other clauses depended upon this.

VOL. III.

R. r

1766.
CARTER
v.
BOEHM.

The counsel for the plaintiff, viz. Mr. Morton, Mr. Dunning and Mr. Wallace, shewed cause on Thursday the first of this month. But first,

Lord MANSFIELD reported the evidence—That it was an action on a policy of insurance for one year : viz. from 16th of October 1759 to 16th October 1760, for the benefit of the governor of *Fort Marlborough*, *George Carter*, against the loss of *Fort Marlborough* in the island of *Sumatra* in the *East Indies*, by its being taken by a foreign enemy. The event happened : the fort was taken, by Count *D'Estaing*, within the year.

The first witness was *Cacthorne*, the policy-broker, who produced the memorandum given by the governor's brother (the plaintiff) to him : and the use made of these instructions was to shew that the insurance was made " for the benefit of governor *Carter*, and to insure him " against the taking of the fort by a foreign enemy."

Both sides has been long in Chancery : and the chancery-evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed ; and particularly, the weakness of the fort, and the probability of its being attacked by the *French* : which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother *Roger Carter*, his trustee, the plaintiff in this cause : the second was from the governor to the *East India-company*.

[1907] The evidence in reply to this objection consisted of three depositions in Chancery, setting forth that the governor had 20,000*l.* in effects : and only insured 10,000*l.* : and that he was guilty of *no fault* in defending the fort.

The first of these depositions was Captain *Tryon's* : which proved that this was not a fort proper or designed to resist *European* enemies : but only calculated for defence against the *natives* of the island of *Sumatra* ; and also that the governor's office is *not military*, but only *mercantile* ; and that *Fort Marlborough* is only a subordinate factory to *Fort St. George*.

There was no evidence to the contrary. And a verdict was found for the plaintiff, by a special jury.

After his lordship had made his report,—

The counsel for the plaintiff proceeded to shew cause against a new trial.

They argued that there was *no such concealment* of circumstances (as the weakness of the fort, or the probability of the attack,) as would amount to a fraud sufficient to vitiate this contract : all which circumstances were *universally known* to every merchant upon the ex-

change of *London*. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. *Dunning* laid it down as a rule—"That the insured is only obliged to discover *facts*; not the *ideas or speculations* which he may entertain, upon such *facts*."

They said, this insurance, was in reality, no more than a wager; "whether the *French* would think it their interest to attack this fort; and if they should, whether they would be able to get a ship of war up the river, or not."

Sir *Fletcher Norton* and Mr. Recorder (*Eyre*) argued, *contra*, for the defendant (the under-writer.)

They insisted, that the insurer has a right to know *as much* as the insured himself knows.

They alledged too, that the *broker* is the sole agent of the insured.

These are general, universal *principles*, in all insurances. [1908]

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he did *not* believe that the insurer would have meddled with the insurance, if he had seen these two letters.

All the circumstances ought to be disclosed.

This wager is not only "whether the fort shall be attacked: but "whether it shall be attacked *AND taken*."

Whatever *really* increases the *risque* ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly, that the plaintiff ought to have discovered the weakness and absolute *indescensibility* of the fort. In *this* case, *as against* the insurer, he was obliged to make such discovery, though he acted for the *governor*. Indeed, a governor ought not, in point of policy, to be permitted to insure *at all*: but if he is *permitted* to insure, or will insure, he ought to disclose all *facts*.

It can not be supposed that the insurer would have insured so low as 4l. *per cent*, if he had known of these letters.

It is begging the question to say, "that a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose: and the *presumption* was "that the fort, the powder, the guns, &c. were in a good and proper condition." If they were not, (and it is agreed that in fact they were not, and that the governor *knew* it,) it ought to have been disclosed. But if

1766.
CARTER
V.
BOEHM.

he had disclosed this, he could not have got the insurance. Therefore this was a fraudulent concealment: and the under-writer is not liable.

It does not follow, that because he did not insure his *whole* property; therefore it is good for what he *has* judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. advisare vult.

[1909] Lord MANSFIELD now delivered the resolution of the court.

THIS is a motion for a new trial.

In support of it, the counsel for the defendant contend, "that some circumstances in the knowledge of governor Carter, not having been mentioned at the time the policy was underwrote, amount to a *concealment*, which ought, in law, to *avoid* the policy."

The counsel for the plaintiff insist, "that the not mentioning these particulars, does *not* amount to a concealment, which ought, in law, to avoid the policy: either as a *fraud*; or, as *varying* the contract."

1st. It may be proper to say something, in general, of *concealments which avoid a policy*.

2dly. To state particularly the case *now* under consideration.

3dly. To examine whether the *verdict*, which finds this policy good although the particulars objected were not mentioned, is *well founded*.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the *insured* only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.

The keeping back such circumstance is a *fraud*, and therefore the policy is *void*. Although the suppression should happen through *mistake*, without any fraudulent intention; yet still the under-writer is *deceived*, and the policy is *void*; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

The policy would equally be void, against the *under-writer*, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium.

[1910] The governing principle is applicable to *all* contracts and dealings.

Good faith forbids either party by concealing what

he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary.

1766.

CARTER

V.

BOEHM.

But either party may be innocently silent, as to grounds open to both, to exercise their judgment upon. *Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; sed cum quod tuscias, id ignorare emolumentum tui causa velis eos, quorum intersit id scire.* [Gic. de Off. L. 3. c. 12, 13.]

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void, in favour of the party misled by his ignorance of the thing concealed.

There are many matters, as to which the insured may be innocently silent—He need not mention what the under-writer knows—*Scientia utrinque par pares contrahentes facit.*

An under-writer can not insist that the policy is void, because the insured did not tell him what he actually knew; what way soever he came to the knowledge.

The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of.

The under-writer needs not be told what lessens the risque agreed and understood to be run by the express terms of the policy. He needs not to be told general topics of speculation: as for instance—The under-writer is bound to know every cause which may occasion natural perils; as, the difficulty of the voyage—the kind of seasons—the probability of lightning, hurricanes, earthquakes, &c. He is bound to know every cause which may occasion political perils; from the ruptures of states from war, and the various operations of it. He is bound to know the probability of safety, from the continuance or return of peace; from the imbecility of the enemy, through the weakness of their counsels, or their want of strength, &c.

If an under-writer insures private ships of war, by sea and on shore, from ports to ports, and places to places, any where—He needs not be told the secret enterprizes they are destined upon; because he knows some expedition must be in view; and, from the nature of his contract, without being told, he waves the information. If he insures for three years, he needs not be told any circumstance to shew it may be over in two: or if he insures a voyage, with liberty of deviation, he needs not be told what tends to shew there will be no deviation.

Men argue differently, from natural phenomena, and political appearances: they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to

[1911]

1766.
CARTER
v.
BOEHM.

both: each professes to act from his own skill and sagacity; and therefore neither needs to communicate to the other.

The *reason* of the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to *such* facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.

The question therefore must always be "whether there was, under all the circumstances at the time the policy was under-written, a *fair representation*; or a *concealment*; fraudulent, if *designed*; or, though not *designed*, *varying materially the object* of the policy, and *changing the risque* understood to be run."

Secondly.

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss for Fort *Marlborough*, from being destroyed by, taken by, or surrendered unto, any *European* enemy, between the 1st of *October* 1759, and 1st of *October* 1760. It was under-written on the 9th of *May* 1760.

The under-writer knew at the time, that the policy was to indemnify, to that amount, *Roger Carter* the governor of Fort *Marlborough*, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort *Marlborough* the 22d of *September* 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the *East India* Company, which the company offered to put into my hands; but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

[1912]

An objection occurred to me at the trial, "whether a policy against the loss of Fort *Marlborough*, for the benefit of the governor, was good;" upon the principle which does not allow a sailor to insure his wages.

But considering that this place, though called a fort, was really but a factory or settlement for trade: and that he, though called a governor, was really but a merchant—Considering too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part-owner; and the captain of a privateer, if he be a part-owner, to insure his share—Considering too, that the objection did not lie, upon any ground of justice, in the mouth of the under-writer, who knew him to be the governor, at the time he took the premium—And as, with regard to principles of public convenience, the case so seldom happens, (I never saw one

before,) any danger from the example is little to be apprehended—I did not think myself warranted, upon that point, to nonsuit the plaintiff; especially too, as the objection did not come from the bar.

Though this point was mentioned, it was not insisted upon, at the last trial: nor has it been seriously argued, upon this motion, as sufficient, alone, to vacate the policy: and if it had, we are all of opinion “that we are not warranted to say it is void, upon this account.

Upon the plaintiff's obtaining these two verdicts, the underwriters went into a court of equity; where they have had an opportunity to sift every thing to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved without contradiction, that the place called *Bencoolen* or *Fort Marlborough* is a factory or settlement, but no military fort or fortress. That it was not established for a place of arms or defence against the attacks of an *European* enemy; but merely for the purpose of trade, and of defence against the natives. That the fort was only intended and built with an intent to keep off the country blacks. That the only security against *European* ships of war, consisted in the difficulty of the entrance and navigation of the river, for want of proper pilots. That the general state and condition of the said fort, and of the strength thereof, was, in general well known, by most persons conversant or acquainted with *Indian* affairs, or the state of the company's factories or settlements; and could not be kept secret or concealed from persons who should endeavour by proper inquiry, to inform themselves. That there were no apprehensions or intelligence of any attack by the *French*, until they attacked *Nattal* in *Feb.* 1760. That on the 8th of *February* 1760, there was no suspicion of any design by the *French*. That the governor then bought, from the witness, goods to the value of 4000*l.* and had goods to the value of above 20,000*l.* and then dealt for 50,000*l.* and upwards. That on the 1st of *April* 1760, the fort was attacked by a *French* man of war of 64 guns and a frigate of twenty guns under the count *D'Estaigue*, brought in by *Dutch* pilots; unavoidably taken; and afterwards delivered to the *Dutch*; and the prisoners sent to *Batavia*.

On the part of the defendant—After all the opportunities of inquiry, no evidence was offered, that the *French* ever had any design upon fort *Malborough*, before the end of *March* 1760; or that there was the least intelligence

1766.

CARTER

V.

BOEHM.

[1913]

1766.
GARTER
V.
BOEHM.

or alarm "that they might make the attempt," till the taking of *Nattal* in the year 1760.

They did not offer to disprove the evidence, that the governor had acted, as in full security, long after the month of *September* 1759; and had turned his money into goods, so late as the 8th of *February* 1760. There was no attempt to shew that he had not lost by the capture very considerably beyond the value of the insurance.

But the defendant relied upon a letter, written to the *East India* Company, bearing date the 16th of *September* 1759, which was sent to *England* by the *Pitt*, Captain *Wilson*, who arrived in *May* 1760, together with the instructions for insuring; and also a letter bearing date the 22d of *September* 1759, sent to the plaintiff by the same conveyance, and at the same time, (which letters his lordship repeated. *)

* The former of these no-

tifies to the *East India* Company, that the French had the preceding year, a design on foot, to attempt taking that settlement by surprize; and that it was very probable that they might revive that design. It confesses and represents the weakness of the fort: its being badly supplied with stores, arms and ammunition: and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly, that the French should attack and take the settlement; for, as they can not muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems, that they had such an intention, last year." And therefore he desires his brother to get an insurance made upon his stock there.

[1914]

They relied too upon the cross-examination of the broker who negotiated the policy, "that, in his opinion, these letters ought to have been shewn, or the contents disclosed; and if they had, the policy would not have been under-written."

The defendant's counsel contended at the trial, as they have done upon this motion, "that the policy was void."—

1st. Because the state and condition of the fort, mentioned in the governor's letter to the *East India* Company, was not disclosed.

2dly. Because he did not disclose, that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement, rather than remain idle.

3dly. That he had not disclosed his having received a letter of the 4th of *February* 1759, from which it seemed that the French had a design to take this settlement, by surprize, the year before.

They also contended, that the opinion of the broker was almost decisive.

The whole was laid before the jury; who found for the plaintiff.

Thirdly.—It remains to consider these objections, and to examine "whether this verdict is well founded."

Thirdly.

To this purpose, it is necessary to consider the nature of the contract, *at the time* it was entered into.

The policy was signed in *May* 1760. The contingency was "whether Fort *Marlborough* was, or would be taken, " by an *European* enemy, between *October* 1759, and " *October* 1760."

The computation of the risque depended upon the chance, "whether any *European* power would attack the " place *by sea*." If they did, it was incapable of resistance.

The under-writer at *London*, in *May* 1760, could judge much better of the probability of the contingency, than governor *Carter* could at *Fort Marlborough*, in *September* 1759. He knew the success of the operations of the war in *Europe*. He knew what naval force the *English* and *French* had sent to the *East Indies*. He knew, from a comparison of that force, whether the sea was open to any such attempt by the *French*. He knew, or might know every thing which was known at *Fort Marlborough* in *September* 1759, of the general state of affairs in the *East Indies*, or the particular condition of *Fort Marlborough*, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the *East India Company*; and, particularly, from the governor. He knew what probability there was of the *Dutch* committing or having committed hostilities.

UNDER these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an *European* power.

IF there had been any design on foot, or any enterprize begun in *September*, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter; because not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an *uncertain* operation, which might or might not be attempted.

But the governor had no notice of any design subsisting in *September*, 1759. There was no such design in fact: the attempt was made without premeditation, from the sudden opportunity of a favourable occasion, by the connivance and assistance of the *Dutch*, which tempted Count *d'Estaigne* to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealment.

The first concealment is, that he did not disclose the condition of the place.

The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could

1766.

CARTER

V.

BOEHM.

[1915]

1766.
CARTER
V.
BOEHM.

not disclose it, consistent with his duty. He knew the governor, by insuring, apprehended at least the possibility of an attack. *With this knowledge, without asking a question, he underwrote.*

By so doing, he took the knowledge of the state of the place *upon himself*. It was a matter as to which he *might be informed* various ways: it was not a matter within the private knowledge of the governor only.

But, not to rely upon that—The utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it *thought* to be: in like manner as it is taken for granted, that a ship insured is sea-worthy.

[1916] What is that condition? All the witnesses agree: "that it was only to resist the *natives*, and not an *European* force." The policy insures against a total loss; taking for granted "that *if* the place was attacked it would be lost."

The contingency therefore which the underwriter has insured against is, "Whether the place would be *attacked* by an *European* force; and not whether it would be able to *resist* such an attack, if the ships could get up the river."

It was particularly left to the jury, to consider, "whether this was the contingency in the contemplation of the parties:" they have found that it *was*.

And we are all of opinion, "that, in this respect, their conclusion is agreeable to the evidence."

In *this* view, the *state and condition of the place* was material *only* in case of a *land-attack* by the *natives*.

The second concealment is—his not having disclosed, that, from the *French* not being able to relieve their friends upon the coast, they *might make them a visit*.

This is no part of the fact of the case: It is a mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt, for the conquered to attack the conqueror in his own dominions. The practicability of it in this case, depended upon the *English* naval force in those seas; which the underwriter could better judge of at *London* in *May, 1760*, than the governor could at *Fort Mifflin* in *September, 1759*.

The third concealment is—that he did not disclose the letter, from *Mr. Winch*, of the 4th of *February, 1759*, mentioning the *design of the French, the year before*.

What that letter was; how he mentioned the design, or upon what authority he mentioned it; or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery; and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account *Winck* wrote to the *East India Company*: which was objected to; and therefore not read.* The nature of that intelligence therefore is very doubtful. But taking it in the strongest light, it is a report of a design to surprise, the year before; but *then dropt*.

This is a topic of mere *general speculation*; which made no part of the *fact* of the case upon which the insurance was to be made.

It was said—If a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud—I agree it. But if he knew that two privateers had been there the year before, it would be no fraud, not to mention that circumstance: because, it does not follow that they will cruise *this year* at the same time, in the same place; or that they are in a condition to do it. If the circumstance of “*this design laid aside*” had been mentioned, it would have tended rather to lessen the risque, than increase it: for, the design of a surprise which has transpired, and been laid aside, is *less* likely to be taken up again; especially by a vanquished enemy.

The jury considered the nature of the governor’s silence, as to these particulars: they thought it innocent: and that the omission to mention them did *not vary the contract*. And we are all of opinion, “that, in this respect, they judged *extremely right*.”

There is a silence, not objected to at the trial nor upon this motion; which might with as much reason have been objected to, as the two last omissions; rather more.

It appears by the governor’s * letter to the plaintiff, * Dated 22d Sept. 1759.
“that he was principally apprehensive of a † *Dutch* † His words are—“And in case of a Dutch war, I would have it (the insurance) done at any rate.”
“war.” He certainly had, what he thought, good grounds for his apprehension. Count *D’Estaing* being piloted by the *Dutch*, delivering the fort to the *Dutch*, and sending the prisoners to *Batavia*, is a confirmation of those grounds. And probably, the loss of the place was owing to the *Dutch*. The *French* could not have got up the river without *Dutch* pilots: and it is plain, the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the *Dutch*.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension, is, because it must have arisen from *political speculation*, and *general intelligence*; therefore, they agree, it is not necessary to communicate such things to an underwriter.

Lastly—Great stress was laid upon the *opinion* of the broker.

1766.

CARTER

V.

BOEHM.

[1918]

1766.
CARTER
v.
BOEHM.

But we all think, the jury ought not to pay the least regard to it. It is mere *opinion*; which is not evidence. It is opinion *after* an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the governor, as to any intention of *fraud*. By the same conveyance, which brought his orders to insure; he wrote to the company every thing which he knew or suspected: he desired nothing to be kept a secret, which he wrote either to them or his brother. His subsequent conduct, down to the 8th of *February*, 1760, shewed that he thought the danger very *improbable*.

The reason of the rule against concealment is, to *prevent fraud* and *encourage good faith*.

If the defendant's objections were to prevail, in the present case, the rule would be *turned* into an *instrument of fraud*.

The underwriter, here, knowing the governor to be acquainted with the state of the place; knowing that he apprehended danger, and must have some ground for his apprehension; being told nothing of either; signed this policy, *without asking a question*.

If the objection "that he was *not told*" is sufficient to vacate it, he took the *premium*, knowing the policy to be *void*; in order to *gain*, if the alternative turned out *one way*; and to make *no satisfaction*, if it turned out *the other*: he drew the governor into a *false confidence*, "that, if the worst should happen, he had *provided* *against* total ruin;" *knowing*, at the same time, "that the indemnity to which the governor trusted was *void*."

[1919] There was not a word said to him, of the affairs of *India*, or the state of the war there, or the condition of *Fort Marlborough*. If he thought that omission an objection *at the time*, he ought not to have signed the policy with a *secret reserve* in his own mind to make it void; If he *dispensed* with the information, and did *not* think this silence an objection *then*; he cannot take it up *now*, after the event.

What has often been said of the statute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud—"that it should never be so turned, construed, or used, as to protect, or be a means of fraud."

Easter Term, 6 Geo. 3.

1919

After the fullest deliberation, we are all clear that the verdict is well founded : and there ought not to be a new trial : consequently, that the rule for that purpose ought to be discharged.

1766.
CARTER
V.
BOEHM.

RULE DISCHARGED.

The End of *Easter* Term, 1766. 6 G. 3.

1920-1921

TRINITY TERM,

6 GEO. 3. B. R. 1766.

REX *versus* Inhabitants of FROME SELWOOD.

See this *case* ABRIDGED, in the TABLE; and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 181. p. 565.

Tuesday, 17th
June, 1766.

CAMPBELL *versus* DALEY.

Special bail on
appearing on
an outlawry.

THE question was. "whether, in a case *originally* requiring special bail, and the defendant standing "out to an *outlawry*, (a) he can come in and appear to "the outlawry *without* putting in *SPECIAL bail*."

See the stat. of 31 *Eliz. c. 3. § 3*; and 4, 5 *W. & M. c. 18. § 4*.

Per Cur.—There ought to be *special* bail; it would be very unreasonable, that the defendant should gain an *advantage*, by standing out till process of outlawry. He certainly ought not to be in a *better* case then, than if he had appeared at first. And accordingly, the direction given was "that the filacer should not issue a "*supersedeas*, till the defendant had put in *special* bail." And a week was given him for that purpose.

[1921]
Wednes. 18th
June 1722.

REX *versus* INHABITANTS of ILMINGTON.

See this *case* ABRIDGED, in the table; and *at large*, in the quarto-edition of my SETTLEMENT-CASES, No. 182. P. 566.

REGULA GENERALIS.

Sheriff to re-
turn writs
within four
days.

FOR the future, the sheriffs of *London* and *Middlesex*, who before could not be compelled to return their writs and bring in the body, till after *six* days, shall be obliged to do it *within four days*.

(a) *Lege exigent, vide 1 Tidd's Prac.* 130, in notes, and see *ante* 1464.

SIMON *versus* MOTIVOS.

1766.

THIS action was brought against the defendant, who had bought goods at an auction, which were not taken away according to the conditions of sale, but put up again and resold. [S.C. 1 Bl. 599. Baller, 275, 280.]

There was a verdict for the plaintiff: and the defendant moved for a new trial. Sales at auctions not within the statute of frauds.

The defendant was a broker; and bid for one *Durant*; but did not name his principal, till some days after.

The auctioneer when he knocked down the lots to the highest bidder, put down his name; in the usual manner, as the purchaser of those goods. The defendant came, the next day, and saw the goods weighed.

The objection now made was, "that this contract, *not being in writing*, was void, by the statute of frauds." [See 3 Burn. 149. 1 Hen. Black 84.]

But THE COURT were, all, clearly of opinion, that the auctioneer must be considered as agent for the buyer (after knocking down the hammer,) as well as for the seller; and that his setting down, in writing, the name of the buyer, the price, &c. was sufficient to take it out of the statute; and that the buyer's coming the next day, and seeing the goods weighed, was an additional circumstance, that deserved attention. And they inclined to think "that buying and selling at auctions was *not* within the statute of frauds." [2 H. Bl. 65, 67. 9 Ves. 249. 7 Ves. 343. and Strange, 506.]

[1922]
Upon the whole, (though *no earnest* was actually paid,) they DISCHARGED the RULE which had been made upon the plaintiff, for him to shew cause why the verdict which he had obtained against the buyer should not be set aside, and why there should not be a new trial. [See 19 Geo. 3. c. 56. s. 3, 6, 11, 14.]

REX *versus* HONOURABLE PETER MACKENZIE.

THIS gentleman's wife having sworn articles of the peace against him and others; and it having appeared fully to the court, as well upon some collateral motions, as upon his own affidavit now produced, "that he had never used any force against her, any otherwise than what was necessary to the care and cure of her as a person disordered in her mind; and *this* too, in pursuance of Dr. Battie's advice; and that he had never, in any other respect, treated her with any sort of ill usage, but quite the contrary;" Husband's recognizance on articles of the peace exhibited against him by the wife, discharged, she being insane.

THE COURT ordered his recognizance to be discharged, and that all proceedings against him be stayed.*

CATCHSIDE, WIDOW AND ADMINISTRATRIX, &c. *versus* OVINGTON.

ON the last day of the last *Easter* Term, Mr. Wallace by leave obtained the day before, "to move it [See 19 Geo. 3. c. 56. s. 3, 6, 11, 14.]

* V. ante, pa. 806. Rex v. Robert Parnell, S. P. accord. Spiritual court cannot decide on inventory.

1766. "then,") made a motion for a prohibition to an ecclesiastical court, on behalf of Mrs. *Catchside* the administratrix.†

V. OVINGTON. † V 1 Mod. Cases, p. 168, *Hinton v. Parker*— "that the spiritual court cannot falsify an inventory, at the suit of a creditor." Also, *Bewick* executrix of *Bewick*, v. Ord. H. 1742. 1 G. 2. B. R.

The case was this—

Mrs. *Catchside*, the widow and administratrix, was cited into an inferior ecclesiastical court, at the promotion of *Anne Ovington* a creditor, "to exhibit an inventory." She brought one in: and the creditor objected to it. There was a decree for the creditor. The administratrix appealed to the superior ecclesiastical court: who affirmed the decree of the inferior ecclesiastical court. His suggestion was, their want of jurisdiction.

[1923] Mr. *Walker* now shewed cause against the prohibition. His cause was—That this is *after sentence*: and therefore they come too late; unless they can shew that the spiritual court have determined contrary to law.

Lord MANSFIELD—It appears upon the face of the proceedings, "that the spiritual court have * no *jurisdiction*." Therefore the rule must be made absolute. To which the other judges agreed.

* v. 21 H. 3. c. 5. § 4.

Which only requires the executors or administrators

to take such an inventory, and to deliver it into the keeping of the bishop or other person having authority to take probate of wills.

RULE MADE ABSOLUTE, for a prohibition.

WALTON, ASSIGNEE, versus BENT.

Action upon a bail-bond must be brought in the same court from whence the writ issued.

IT was agreed by court and counsel, now, (and was so likewise, a few days ago,)

That an action upon a bail-bond must be brought in the same court where the bail was given; and that this is now the settled practice. †

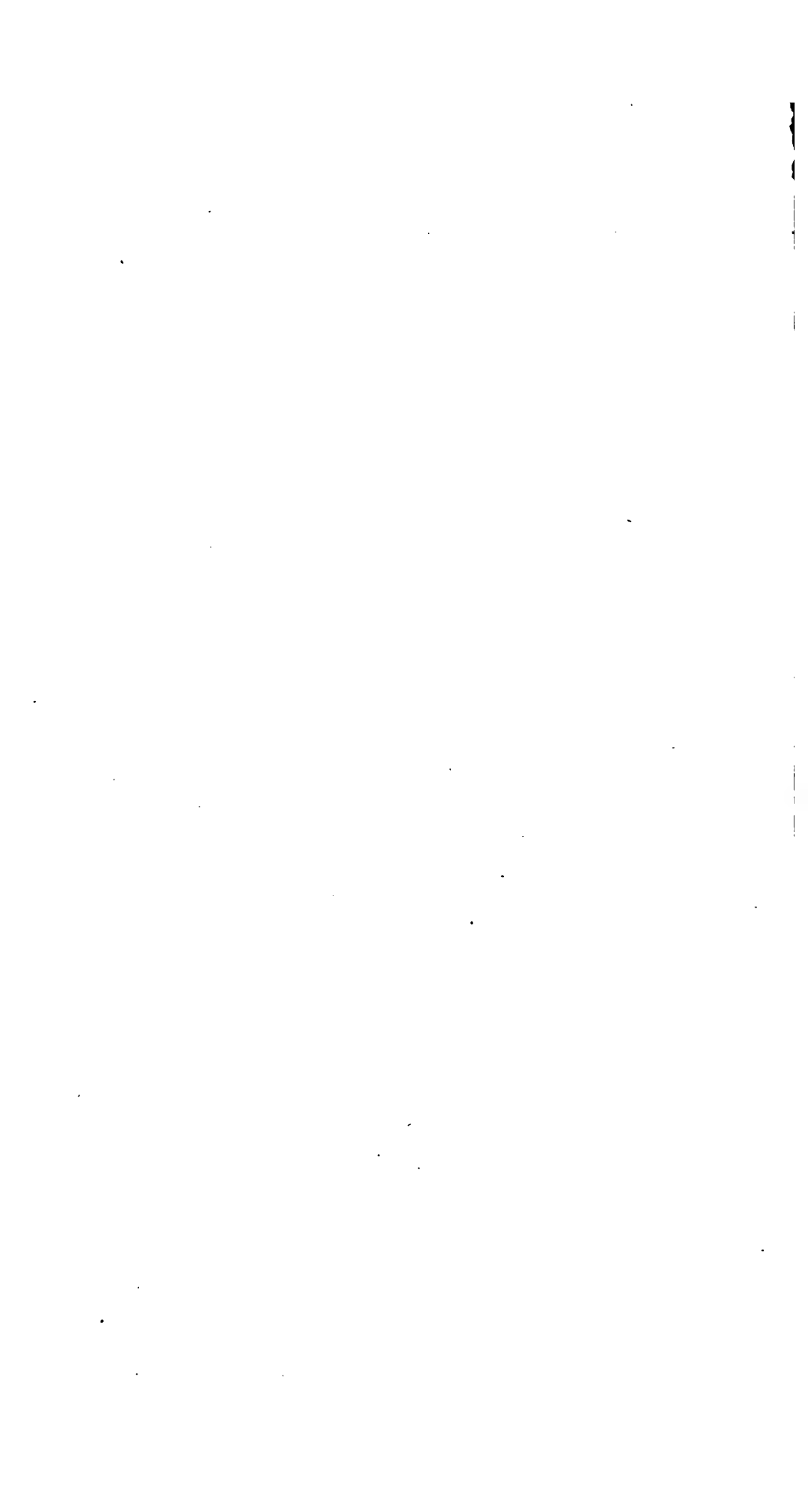
Therefore, in the present case, the proceedings in this court were stayed; the bail-bond upon which this action was brought, having been given upon a process out of the Common Pleas.

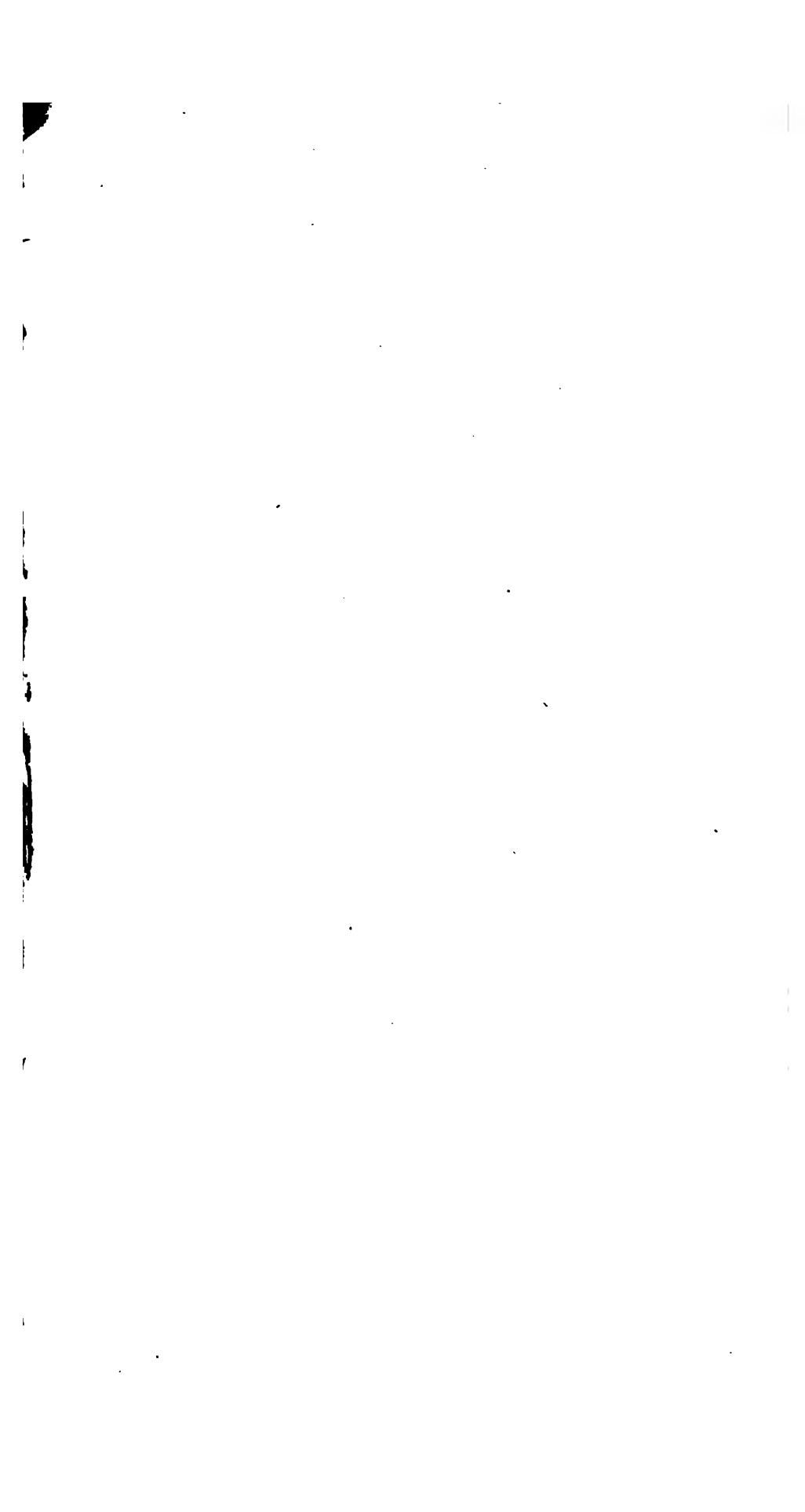
RULE to stay PROCEEDINGS here.

THE END OF TRINITY TERM 1766. 6 G. 3.

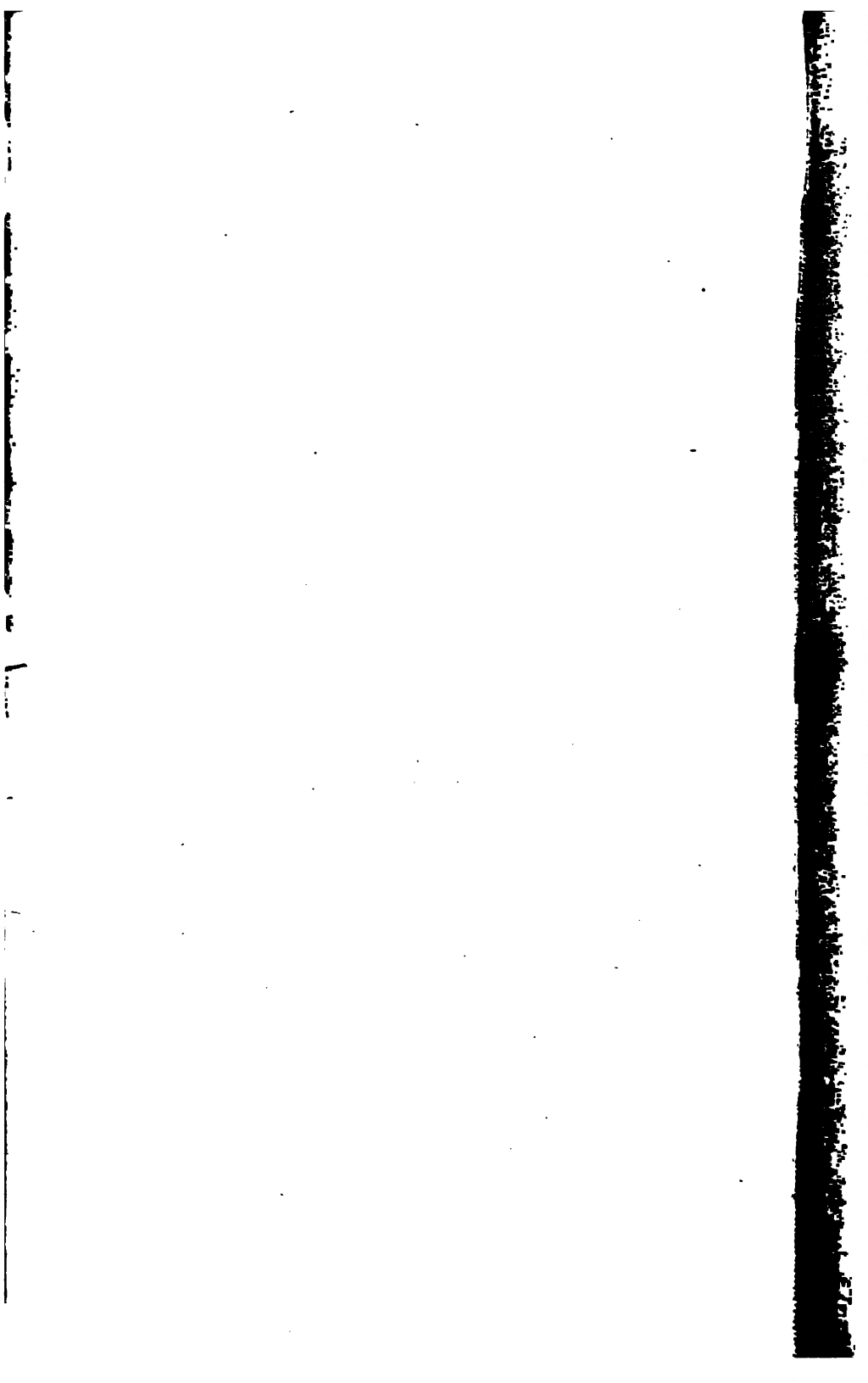
AND OF THE THIRD VOLUME.

dd 518
2293
S. P. accord.
Ald. 3 Wils.
318. acc. and
Durn. 153.]
in CL-1113631-
objection taken
under non est factum. 26th Feb 1796.









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